Supreme Court, U.S.
FILED

94 542 SEP 26 1994

OFFICE OF THE CLERK

No. 94-___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ALLIED-SIGNAL AEROSPACE COMPANY,
GARRETT ENGINE DIVISION AND
GARRETT AUXILIARY POWER DIVISION,

Petitioner,

v.

THE UNITED STATES, THE TORRINGTON COMPANY,
AND FEDERAL-MOGUL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX

LOUIS S. MASTRIANI
Counsel of Record
GREGORY C. ANTHES
ADDUCI, MASTRIANI,
SCHAUMBERG & SCHILL
1140 Connecticut Ave., N.W.
Suite 250
Washington, D.C. 20036
(202) 467-6300

Attorneys for Petitioner

163 PP

TABLE OF CONTENTS

APPENDIX A 1a

APPENDIX B 11a

APPENDIX C 18a

APPENDIX D 22a

APPENDIX E 24a

APPENDIX F 41a

APPENDIX G 42a

APPENDIX H 54a

APPENDIX I 67a

APPENDIX J 84a

APPENDIX K 86a

APPENDIX L 87a

APPENDIX M 90a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-1112

ALLIED-SIGNAL AEROSPACE COMPANY,
GARRETT ENGINE DIVISION AND
GARRETT AUXILIARY POWER DIVISION,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee,

THE TORRINGTON COMPANY,

Defendant-Appellee,

and

FEDERAL-MOGUL CORPORATION,

Defendant-Appellee.

Louis S. Mastriani, Attorney, Adduci, Mastriani, Schaumberg & Schill, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief was Gregory C. Anthes.

Velta A. Melnbrencis, Attorney, U.S. Department of Justice, of Washington, D.C., argued for defendant-appellee, The United States. With her on the brief were Frank W. Hunger, Assistant Attorney General and David M. Cohen, Director. Also on the

brief were Stephen J. Powell, Berniece A. Browne and Thomas H. Fine, of counsel.

Frederick L. Ikenson, Attorney, Frederick L. Ikenson, P.C., of Washington, D.C., argued for defendant-appellee, Federal-Mogul Corporation.

Appealed from: United States Court of International Trade

Judge Tsoucalas

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-1112

ALLIED-SIGNAL AEROSPACE COMPANY,
GARRETT ENGINE DIVISION and
GARRETT AUXILIARY POWER DIVISION,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee,

THE TORRINGTON COMPANY,

Defendant-Appellee,

and

FEDERAL-MOGUL CORPORATION,

Defendant-Appellee.

DECIDED: June 30, 1994

Before MICHEL, Circuit Judge, BENNETT, Senior Circuit Judge, and LOURIE, Circuit Judge.

LOURIE, Circuit Judge.

Allied-Signal Aerospace Company appeals from the judgment of the United States Court of International Trade affirming the determination on remand of the Department of Commerce, International Trade Administration (ITA), concerning antidumping duty margins for antifriction bearings from France. Allied-Signal Aerospace Co. v. United States, No. 91-08-00571 (Ct. Int'l Trade October 14, 1993). Because the ITA's determination is consistent with our holding in Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185 (Fed. Cir. 1993) (Allied-Signal I), we affirm the judgment.

BACKGROUND

In this appeal, we revisit the two-tier methodology utilized by the ITA in determining the best information available (BIA) for a party that "refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes" an antidumping duty investigation. 19 U.S.C. § 1677e(c) (1988). The undisputed facts are recounted here to the extent they are pertinent to the issues on appeal.[1]

Following an investigation into whether antifriction bearings were being, or were likely to be, sold in the United States at less than fair value (LTFV), the ITA issued final orders imposing antidumping duties on antifriction bearings from France on May 15, 1989. The ITA subsequently conducted an administrative review of those orders for the period from November 9, 1988 through April 30, 1990. One of the companies subject to the review was SNFA S.A., a French manufacturer of customized aerospace bearings. SNFA was not one of the bearing manufacturers individually investigated by the ITA in the original LTFV investigation.

In responding to the ITA's request for information relating to SNFA's sales for the period under review, SNFA claimed that

---

[1] A detailed history of this case is set out in Allied-Signal I.

it was unable to supply all the requested data due to its limited resources and small sales volume. The ITA consequently resorted to the best information available, which it derived using its two-tier BIA methodology.[2] Deeming the first tier of the methodology to be applicable to SNFA, the ITA assigned duty rates of 66.42% and 18.37% to SNFA's sales of ball bearings and cylindrical roller bearings, respectively. Those rates constituted the highest rates assigned to any party from the original LTFV investigation.

---

[2] The two-tier BIA methodology is as follows:

> 1. When a company refused to cooperate with the [ITA] or otherwise significantly impeded these proceedings, we have used as BIA the higher of (1) The highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less than fair value investigation (LTFV) or (2) the highest rate found in this review for the same class or kind of merchandise in the same country of origin.
>
> 2. When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we have used as BIA the higher of: (1) The firm's LTFV rate for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

56 Fed. Reg. 31705.

Allied-Signal, a domestic importer of antifriction bearings, challenged the final dumping margins assigned to SNFA. Although the BIA methodology employed by the ITA was ultimately upheld on appeal in Allied-Signal I, we disagreed with the ITA's decision to apply the first tier of the two-tier methodology with respect to SNFA. We concluded that application of the first tier was improper because SNFA's failure to provide a complete response to the ITA's request for information was not caused by deliberate recalcitrance, but was due to its inability to provide the data. Because the record indicated that SNFA had substantially cooperated with the ITA, we remanded the case to allow the ITA to "recalculate the dumping margins at issue under the second tier of the two-tier BIA methodology." 996 F.2d at 1193.

The ITA issued its final remand results on July 27, 1993, assigning margins of 65.13% and 17.31% to SNFA's sales of ball bearings and cylindrical roller bearings, respectively. Consistent with the second tier of the BIA methodology, the ITA selected the "all others" rates from the LTFV investigation, which were higher than any rates calculated in the review period for those bearings. Allied-Signal contested the remand results, claiming that they were inconsistent with Allied-Signal I. The Court of International Trade sustained the ITA's determination and dismissed the action. Allied-Signal now appeals.

DISCUSSION

Dissatisfied with the results obtained on remand, Allied-Signal once again contests the ITA's application of the BIA methodology to SNFA. Allied-Signal contends that Allied-Signal I requires the ITA to use the highest rate calculated for any company in the administrative review as the second-tier BIA rate for a nonresponsive party, such as SNFA, who was not assigned its own rate from the original LTFV investigation. Allied-Signal alleges that on remand, the ITA violated the Allied-Signal I remand order by using the "all others" rates.

In support of that contention, Allied-Signal relies on the following passage in Allied-Signal I:

> the critical difference in BIA treatment under the first and second tiers lies in the range of LTFV margins subject to consideration as the best information available. Under the first tier, the ITA may consider the margin of any company involved in the prior LTFV investigation. Under the second tier, the ITA may only consider a particular firm's own prior LTFV rate.

996 F.2d at 1191 (emphasis added). Pursuant to that "order," and focusing on the underscored language, Allied-Signal argues that only the firm's own LTFV rate may be used. It asserts that, failing that, the ITA should have assigned to SNFA the highest rates calculated in the administrative review (i.e., margins of 7.79% and 10.63% for ball bearings and cylindrical roller bearings, respectively), because SNFA was not assigned its own rates from the LTFV investigation.

The position taken by Allied-Signal in this appeal is a poorly disguised attempt to reargue what has already been decided in Allied-Signal I. By taking a sentence in the opinion completely out of the context in which it was written, Allied-Signal distorts its meaning and purpose. The paragraph in Allied-Signal I upon which Allied-Signal relies is part of a general discussion comparing the two tiers of the ITA's BIA methodology. In that discussion, we recognized that the basic distinction between the two tiers lies in subdivision (1) of each tier. In the first tier, subdivision (1) provides that the highest of the LTFV rates found for any firm can be used. In contrast, subdivision (1) of the second tier limits the applicable LTFV rate to the firm's own rate,

assuming there is one. However, the latter subdivision contains an explicit provision instructing that "if the firm was not individually investigated," the "all others" rate from the LTFV investigation is to be considered. The ITA's inability to use the firm's own rate thus does not mandate use of the highest rate calculated in the administrative review.

Allied-Signal makes much of the fact that in analyzing the BIA methodology, we did not expressly recognize the second tier's "all others" proviso applicable to firms that were not individually investigated in the LTFV investigation. Allied-Signal suggests that in doing so, we amended the second tier to eliminate the proviso altogether. We reject that unjustified reading of Allied-Signal I.

In Allied-Signal I, we held unequivocally that the "two-tier methodology adopted by the ITA and used in its administrative review of antidumping duty orders is a reasonable and permissible exercise of the ITA's statutory authority to use the best information available when a respondent refuses or is unable to provide requested information." 996 F.2d at 1192. We then clearly directed the ITA to recalculate the dumping margins at issue under the second tier. The ITA's determination on remand is consistent and in accordance with that directive. By reciting the language of the second tier in its entirety elsewhere in the opinion, see 996 F.2d at 1188, it should have been clear that we were aware of all of its provisions and did not judicially expunge the proviso by inference. Thus, use of the "all others" rate was not precluded.

Alternatively, Allied-Signal argues that the rates assigned to SNFA are not supported by substantial evidence in view of the ITA's failure to provide a reasonable explanation for its application of the "all others" rates from the LTFV investigation. Allied-Signal claims that because the ITA's use of the "all others" rates represents a departure from established agency practice respecting the determination of BIA for nonresponsive parties, the agency was "obligated to supply a reasoned analysis for the change." Motor Vehicle Mfrs. Ass'n of the United States, Inc. v.

State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 42 (1983). That argument reflects a basic misunderstanding of the nature of the ITA's "BIA policy."

In Motor Vehicle, the Supreme Court stated that an agency's decision to revoke an existing regulation promulgated under the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553, is void as arbitrary and capricious in the absence of a reasoned explanation for the revocation. As is explained below, Allied-Signal's reliance on Motor Vehicle in support of its contention that the ITA was required to afford a reasoned explanation for its application of a new BIA methodology is misplaced.

The ITA's selection of the "all others" rates under the second tier of its new BIA methodology was not the type of "change in course" contemplated in Motor Vehicle to which a rationale by the agency was required. Unlike the regulation at issue in Motor Vehicle, the BIA methodology employed by the ITA in previous investigations did not rise to the level of an agency regulation having the force and effect of law. The fact that the ITA's prior methodology may appear to have been a de facto BIA "policy" by virtue of its long-time or consistent use did not preclude the ITA from utilizing a different methodology when, as in the present case, the agency determined in its discretion that the circumstances so warranted.

In issuing the final results of the administrative review, the ITA explained that the determination of the best information available for a nonresponsive party is determined by the agency on a "case-by-case" basis. 56 Fed. Reg. 31705 (Issues Appendix, Section 5: Best Information Available). Here, the ITA concluded that the two-tier methodology was the appropriate means of assessing the best information available for SNFA. That conclusion was upheld in Allied-Signal I as consistent with the agency's delegated authority to determine what the best information available is for a particular respondent. See 996 F.2d at 1191. In view of the discretionary, case-by-case nature of the

agency's BIA determinations, the ITA is obligated only to use a methodology consistent with its statutory authority, and it is not required to supply a "reasoned analysis" justifying its adoption.

CONCLUSION

The judgment of the Court of International Trade sustaining the agency's determination on remand is affirmed.

AFFIRMED

APPENDIX B

Slip Op. 93-200

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: JUDGE NICHOLAS TSOUCALAS

ALLIED-SIGNAL AEROSPACE COMPANY, GARRETT ENGINE DIVISION AND GARRETT AUXILIARY POWER DIVISION,	
Plaintiff,	
v.	Court No. 91-08-00571
UNITED STATES,	
Defendant,	
THE TORRINGTON COMPANY,	
Defendant-Intervenor,	
FEDERAL-MOGUL CORPORATION,	
Defendant-Intervenor.	

Plaintiff contests the remand results of the Department of Commerce, International Trade Administration ("Commerce"), in this case, claiming that they were unsupported by substantial evidence and not in accordance with law.

Held: Commerce acted in accordance with law and the remand results are hereby affirmed.
[Remand results affirmed; case dismissed.]

Dated: October 14, 1993

Adduci, Mastriani, Schaumberg & Schill (Louis S. Mastriani, and Gregory C. Anthes) for plaintiff.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Velta A. Melnbrencis and Michael S. Kane); of counsel: John D. McInerney, Acting Deputy Chief Counsel for Import Administration, Thomas H. Fine, and Craig R. Giesze, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Myron A. Brilliant and Robert A. Weaver) for The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Larry Hampel and Joseph A. Perna, V) for Federal-Mogul Corporation.

OPINION

TSOUCALAS, Judge: Plaintiff, Allied-Signal Aerospace Company, Garrett Engine Division and Garrett Auxiliary Power Division ("Allied-Signal"), contest the remand results of the Department of Commerce, International Trade Administration ("Commerce"), in this case, claiming that they were unsupported by substantial evidence and not in accordance with law.

Allied Signal is an importer of bearings manufactured by SNFA Bearings, Ltd. ("SNFA"). In May 1989, Commerce published Final Determinations of Sales at Less Than Fair Value:

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France ("LTFV determination"), 54 Fed. Reg. 19,092 (1989). In this less than fair value ("LTFV") determination, Commerce assigned antidumping duty margins to French companies that exported antifriction bearings including SNFA.[1]

In the final results of the administrative review at issue, Commerce resorted to best information available ("BIA") and selected the highest dumping margins of any company from the LTFV determination. Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 Fed. Reg. 31,692, 31,705 (1991). On September 17, 1992, the Court of International Trade affirmed this determination. Allied-Signal Aerospace Co. v. United States, 16 CIT ___, 802 F. Supp. 463 (1992).

On June 22, 1993, the United States Court of Appeals for the Federal Circuit affirmed Commerce's use of a two-tier BIA methodology, but reversed the judgment of the Court of International Trade and stated that Commerce should have utilized the second tier. See Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185 (Fed. Cir. 1993). The Federal Circuit instructed Commerce to utilize the second tier of its BIA methodology stating that the ITA assigns to a respondent the higher of its own prior LTFV rate or the highest rate calculated in the current administrative review. Id. at 1193. On July 27, 1993, in accordance with the Federal Circuit's instructions, this Court issued an order remanding the case to Commerce to recalculate the dumping margins at issue under the second tier of Commerce's two-tier BIA methodology. Allied-Signal Aerospace Co. v. United States, 17 CIT ___, Slip Op. 93-140 (July 27, 1993).

---

[1] Id. at 19,096. The ITA did not calculate a company-specific rate for SNFA; it assigned to SNFA's bearings the "all others" rate. Id.

On September 1, 1993, Commerce completed its remand results with the revised dumping margins for SNFA using as BIA the "all others" rate from the LTFV investigation. See Final Results of Redetermination Pursuant to Court Remand at 2.

Plaintiff now claims that Commerce's remand results are not in accordance with the Federal Circuit's opinion because Commerce did not use the respondent's own rate from the LTFV determination and, furthermore, that Commerce's remand results are not in accordance with law or supported by substantial evidence. Memorandum of Plaintiff in Opposition to Final Results of the Department of Commerce's September 2, 1993 Remand Redetermination at 2. Plaintiff moved for oral argument on this issue which was opposed by defendant and defendant-intervenors. On October 12, 1993, the Court denied plaintiff's motion for oral argument on the grounds that oral argument was unnecessary.

The second tier of Commerce's BIA methodology is used for companies that "substantially cooperated with our [Commerce's] requests for information but failed to provide the information requested in a timely manner or in the form required." It is calculated by taking

> the higher of: (1) the firm's LTFV rate for the subject merchandise (or the "all-others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

Allied-Signal, 996 F.2d at 1188 (emphasis added).

In this case, SNFA was not individually investigated during the LTFV investigation. Therefore, Commerce selected from the highest of the "all others" rate from the LTFV

investigation or the highest calculated rate in the review. Plaintiff claims that the "all others" rate is inappropriate since the Federal Circuit specifically stated that Commerce is to look at the respondent's own LTFV rate. What plaintiff is overlooking, however, is that in the absence of a respondent's own rate, the "all others" rate is the rate that applies to the respondent. Therefore, this Court affirms Commerce's remand determination and this case is hereby dismissed.

s/Nicholas Tsoucalas
NICHOLAS TSOUCALAS
JUDGE

Dated: October 14, 1993
New York, New York

JUDGMENT

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: JUDGE NICHOLAS TSOUCALAS

ALLIED-SIGNAL AEROSPACE COMPANY, GARRETT ENGINE DIVISION AND GARRETT AUXILIARY POWER DIVISION, Plaintiff, v. UNITED STATES, Defendant, THE TORRINGTON COMPANY, Defendant-Intervenor, FEDERAL-MOGUL CORPORATION, Defendant-Intervenor.	Court No. 91-08-00571

This case, having been remanded by the Court on July 27, 1993, to the Department of Commerce, International Trade Administration, for recalculation of dumping margins, and Commerce, having completed such recalculation as published in its remand results dated September 1, 1993,

IT IS HEREBY ORDERED that said remand results are affirmed; and it is further

ORDERED that this case is dismissed.

s/Nicholas Tsoucalas
NICHOLAS TSOUCALAS
JUDGE

Dated: October 14, 1993
New York, New York

APPENDIX C

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C 20230

A-427-801
AR 88-90 (Remand)
Public Document
OADC:MFP

MEMORANDUM FOR: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

THROUGH: Roland L. MacDonald, Director
Office of Agreements Compliance

FROM: Holly A. Kuga, Director
Office of Antidumping Compliance

SUBJECT: Remand - Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France - First Administrative Review

Attached for your signature are "Final Results of Redetermination Pursuant to Court Remand" in the case of Allied-Signal Aerospace Company, Garrett Engine Division and Garrett Auxiliary Power Division v. United States, Slip Op. 93-140 (July 27, 1993).

The remand pertains to 1 company in the first administrative review of Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France. Recalculations were required for ball bearings and cylindrical roller bearings.

In Allied-Signal v. United States, the Court remanded the [sic] Department to recalculate the dumping margins under the second-tier BIA methodology.

Recommendation

That you sign the attached final results of redetermination.

Concurrence:

s/Diane McDevitt for
Chief Counsel
for Import Administration

Approval: Yes ✓ No __

s/Joseph A Spetrini
Acting Assistant Secretary
for Import Administration

Attachment

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND, Allied-Signal Aerospace, Garrett Engine Division and Garrett Auxiliary Power Division v. UNITED STATES

SLIP OP. 93-140 (July 27, 1993)

SUMMARY

The Department of Commerce has prepared these final results of redetermination pursuant to the remand order from the U.S. Court of International Trade in Allied-Signal Company v. United States, Slip Op. 93-140 (July 27, 1993).

BACKGROUND

On June 22, 1993, the United States Court of Appeals for the Federal Circuit, Appeal No. 91-1049 reversed and on July 13, 1993, remanded to the Court of International Trade (the Court), its decision in Allied-Signal Company v. United States (Allied-Signal). On July 27, 1993, the court, in Allied-Signal, Slip Op. 93-140, remanded the final results of the 1988-90 administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof, from France et al. (56 FR 31748, July 11, 1991) to the Department of Commerce (the Department) for recalculation. The plaintiff in this case was Allied-Signal Company, an importer of bearings from the French manufacturer, SNFA. The remand pertains to one company. The results cover the period from November 9, 1988 to April 30, 1990.

In Allied-Signal, the Court remanded the [sic] Department to recalculate the dumping margins for SNFA under the second-tier best information available (BIA) methodology. The second-tier BIA rate is used for companies that cooperate substantially with our requests for information, but failed to provide the information requested in a timely manner or in the form required. It is

calculated by taking the higher of: (1) The firm's own rate, from the less-than-fair-value (LTFV) investigation, for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in the current review for the class or kind of merchandise from the same country of origin.

FINAL RESULTS OF REDETERMINATION

In accordance with the decision of the Court, the Department has revised the dumping margins for SNFA using the highest second-tier BIA rate, which is the "all others" rate from the LTFV investigation. The revised weighted-average dumping margins are:

Company	BBs	CRBs
SNFA	65.13	17.31

This redetermination is in accordance with the order of the Court in Allied-Signal v. United States, Slip Op. 93-140 (July 27, 1993).

s/Joseph A. Spetrini
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

9/1/93
(Date)

APPENDIX D

Slip Op. 93-140

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: JUDGE NICHOLAS TSOUCALAS

ALLIED-SIGNAL AEROSPACE COMPANY, GARRETT ENGINE DIVISION AND GARRETT AUXILIARY POWER DIVISION,	:	
Plaintiff,	:	
v.	:	Court No. 91-08-00571
UNITED STATES,	:	
Defendant,	:	
THE TORRINGTON COMPANY,	:	
Defendant-Intervenor,	:	
FEDERAL-MOGUL CORPORATION,	:	
Defendant-Intervenor.	:	

In accordance with the decision (June 22, 1993) and mandate (July 13, 1993) of the United States Court of Appeals for the Federal Circuit, Appeal No. 91-1049,

IT IS HEREBY ORDERED that this case is remanded to the Department of Commerce, International Trade Administration

("Commerce") to recalculate the dumping margins at issue under the second tier of the two-tier BIA methodology; and it is further

ORDERED that Commerce will report the results of this remand to the Court within forty-five (45) days of the entry of this order.

s/Nicholas Tsoucalas
NICHOLAS TSOUCALAS
JUDGE

Dated: July 27, 1993
New York, New York

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 93-1049

ALLIED-SIGNAL AEROSPACE COMPANY,
GARRETT ENGINE DIVISION and
GARRETT AUXILIARY POWER DIVISION,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee,

and

THE TORRINGTON COMPANY and
FEDERAL-MOGUL CORPORATION,

Defendant-Appellee.

Louis S. Mastriani, Adduci, Mastriani, Meeks & Schill, of Washington, D.C., argued for the Plaintiffs-Appellants. With him on the brief was Gregory C. Anthes.

James R. Cannon, Jr., Stewart & Stewart, of Washington, D.C., and Michael S. Kane, U.S. Department of Justice, argued for the Defendant-Appellee. Also on the brief were Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine and Robert A. Weaver, of Stewart & Stewart, Washington, D.C.

Appealed from: U.S. Court of International Trade
Judge Tsoucalas

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 93-1049

ALLIED-SIGNAL AEROSPACE COMPANY,
GARRETT ENGINE DIVISION and
GARRETT AUXILIARY POWER DIVISION,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee,

and

THE TORRINGTON COMPANY and
FEDERAL-MOGUL CORPORATION,

Defendant-Appellee.

DECIDED: June 22, 1993

Before MICHEL, Circuit Judge, BENNETT, Senior Circuit Judge, and LOURIE, Circuit Judge.

LOURIE, Circuit Judge.

Allied-Signal Aerospace Company appeals from the judgment of the United States Court of International Trade denying Allied-Signal's motion for judgment on the agency record and affirming the final determination of the United States Department of Commerce, International Trade Administration (ITA) after an administrative review of antidumping duty orders covering antifriction bearings from France. Allied-Signal Aerospace Co. v. United States, 802 F. Supp. 463 (Ct. Int'l Trade 1992). In reviewing the dumping margins for bearings imported by Allied-Signal, the ITA used the highest dumping rates assigned to any company in the original antidumping investigation as the "best information otherwise available" under 19 U.S.C. § 1677e(c) (1988). We reverse and remand.

BACKGROUND

In response to a petition filed in 1988 on behalf of the domestic antifriction bearing industry, the ITA initiated an investigation to determine whether to impose antidumping duties on antifriction bearings and parts thereof from France. Upon the conclusion of its investigation, the ITA determined that such bearings were being, or were likely to be, sold in the United States at less than fair value (LTFV). 54 Fed. Reg. 19092 (Dep't Comm. 1989). Pursuant to that LTFV determination, the ITA issued the following "weighted average" dumping margins covering antifriction bearings from France:

Ball Bearings	Margin Percentage
INA	66.18
SKF	66.42
SNR	56.50
All others	65.13

Cylindrical Roller Bearings	Margin Percentage
INA	11.03
SNR	18.37
All others	17.31

Id. at 19096. On May 15, 1989, the ITA published final orders imposing antidumping duties on antifriction bearings imported from France consistent with its LTFV determination. Id. at 20902.

On the first anniversary of the publication of the antidumping duty orders, the ITA notified interested parties of an opportunity to request administrative review of the orders pursuant to 19 U.S.C. § 1675 (1988). 55 Fed. Reg. 19093 (May 8, 1990). Allied-Signal, a United States purchaser and importer of antifriction bearings, submitted a request for administrative review of ball bearings and cylindrical roller bearings produced by SNFA S.A., a French manufacturer of customized aerospace bearings. On June 11, 1990, the ITA initiated the review for the period from November 9, 1988 through April 30, 1990. 55 Fed. Reg. 23,575.

The ITA subsequently issued a questionnaire to SNFA requesting factual information pertinent to the review, pursuant to 19 C.F.R. § 353.22(c)(2) (1992). The ITA questionnaire requested general corporate information (Section A), data on U.S. sales (Section B), data on home market sales (Section C), and cost of production information and constructed value data (Section D) for the review period. SNFA, however, provided information responding only to Section A of the questionnaire due to what it alleged were procedural and financial obstacles prohibiting it from providing the remaining requested data. Because SNFA was deemed to have provided an "inadequate response" to the questionnaire, the ITA resorted to the "best information available" (BIA), which it concluded was represented by "the highest margin calculated in the final determination of sales at less than fair value (LTFV) or this review." 56 Fed. Reg. 11179.

The ITA published its preliminary results from the administrative review on March 15, 1991. For the period from November 9, 1988 through April 30, 1990, the ITA issued the following preliminary dumping margins:

Ball Bearings	Margin Percentage
SKF-France	6.97
Fiat Aviazione	0.00
SNECMA	0.08
Aerospatiale	8.09
Turbomeca	10.43
Pratt & Whitney Canada	4.89
SNR Roulements	0.36
INA Roulements	66.42
SNFA	66.42
Dowty Rotol	66.42

Cylindrical Roller Bearings	Margin Percentage
SKF-France	No sales
Fiat Aviazione	No sales
SNECMA	0.29
Aerospatiale	22.73
Turbomeca	1.88
Pratt & Whitney Canada	4.89
SNR Roulements	0.31
SNFA	22.73
INA Roulements	22.73
Dowty Rotol	No Sales

56 Fed. Reg. 11181 (emphases added). The preliminary dumping margin of 66.42% for SNFA's ball bearings constituted the highest margin assigned to any producer of ball bearings in the original LTFV investigation. Similarly, the preliminary margin of 22.73% for SNFA's cylindrical roller bearings constituted the highest margin calculated for any producer of such bearings in the administrative review.

Allied-Signal contested the ITA's preliminary determination, alleging that the proposed rates were inordinately harsh and punitive given SNFA's willingness to cooperate. Allied-Signal also claimed that by applying rates based on the original LTFV investigation, the ITA ignored the most recent

information available, namely, current verified information submitted by other comparable respondents during the review. On July 11, 1991, the ITA published its final results. For the period from November 9, 1988 through April 30, 1990, the ITA made the following final dumping margin determinations:

Ball Bearings	Margin Percentage
SKF-France	7.79
SNECMA	0.21
Fiat Aviazione	0.00
ADH	2.64
Turbomeca	6.85
Pratt & Whitney Canada	4.33
SNR	2.03
INA-France	66.42
SNFA	66.42
Dowty Rotol	0.00
All others	7.79

Cylindrical Roller Bearings	Margin Percentage
SKF-France	No sales
SNECMA	0.24
Fiat Aviazione	No sales
ADH	3.15
Turbomeca	10.63
Pratt & Whitney Canada	2.07
SNR	1.08
INA-France	18.37
SNFA	18.37
Dowty Rotol	No sales
All others	10.63

56 Fed. Reg. 31750 (emphases added).

In reaching its final results, the ITA again resorted to the best information available and explained its BIA policy:

> For the purposes of these final results of review, we have applied two tiers of BIA:
> 1. When a company refused to cooperate with the [ITA] or otherwise significantly impeded these proceedings, we have used as BIA the higher of (1) The highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less than fair value investigation (LTFV) or (2) the highest rate found in this review for the same class or kind of merchandise in the same country of origin.
> 2. When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we have used as BIA the higher of: (1) The firm's LTFV rate for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

56 Fed. Reg. 31705. The ITA stated that because "SNFA responded only to section A of our questionnaire and provided no further responses . . . [we therefore] applied the first tier of BIA." Id. Thus, the dumping margin determinations of 66.42% for ball bearings and 18.37% for cylindrical roller bearings manufactured by SNFA were each the highest margins assigned to any company from the original LTFV determination for those types of bearings.

On August 29, 1991, Allied-Signal filed a complaint in the United States Court of International Trade challenging the ITA's

final dumping margin determination. Allied-Signal did not dispute that the ITA was required under 19 U.S.C. § 1677e(c) to use the best information available in making its determination. However, Allied-Signal argued that in selecting the highest rates from the original LTFV investigation as the best information available, the ITA used its "two-tier" BIA methodology in a punitive manner, thereby frustrating the remedial purpose of the antidumping laws. Allied-Signal also argued that the ITA abused its discretion in failing to consider the available verified information submitted for the administrative review record by other similarly situated bearing manufacturers, which it claimed more accurately reflected market conditions during the review period.

Allied-Signal moved for judgment on the record, and that motion was denied. The court concluded that the agency was justified in applying the "first tier" of the methodology because SNFA failed to adequately respond to the questionnaire. 802 F. Supp. at 466. The court also concluded that the agency's selection of the highest prior margins was reasonably within its broad discretion in selecting the best information available. Id. Lastly, the court rejected Allied-Signal's contention that the ITA punitively applied its BIA methodology to SNFA's bearing entries because Allied-Signal did not offer evidence to show that the margins selected by the ITA were demonstrably less probative of current market conditions than the review margins. Id. at 467. Accordingly, the court affirmed the final determination in all respects and dismissed the case.

DISCUSSION

We review the decision of the Court of International Trade by applying de novo the statutory standard of review to the underlying agency determination. U.H.F.C. Co. v. United States, 916 F.2d 689, 696 (Fed. Cir. 1990). We must determine whether the trial court correctly concluded that the ITA's determination was not "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988).

Allied-Signal alleges that for the period of review, the ITA improperly assigned antidumping duty margins to SNFA's bearings based on what Allied-Signal characterized as a "punitive" two-tier BIA methodology. The punitive nature of the ITA's duty assessment, according to Allied-Signal, is evidenced by the ITA's refusal to consider alternative simplified reporting requirements for SNFA and its rejection of lower margins based upon verified information allegedly more probative of current market conditions. Allied-Signal claims that the ITA's final determination was not in accordance with law because the ITA's punitive use of its BIA policy frustrated the remedial purpose of the antidumping laws.

The ITA's selection of the best information available in a given case is necessarily predicated on the agency's interpretation of the governing statutory and regulatory provisions. Thus, in examining the propriety of that selection, we must consider the scope of the statutory authority conferred upon the ITA regarding the use of the best information available, the ITA's implementation of that authority through its promulgated regulations, and the ITA's execution of its regulations through its articulated "BIA policy."

Section 776 of the Tariff Act of 1930 contains two important rules governing the use of "best information available" in antidumping determinations. First, the statute mandates that the ITA "shall verify all information relied upon" in reaching a final determination in an antidumping investigation or an administrative review. 19 U.S.C. § 1677e(b) (1988). If the ITA is unable to verify the accuracy of the information it receives, then "it shall use the best information available to it as the basis for its action." Id. Second, "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation," both the ITA and the U.S. International Trade Commission (ITC) are required to use "the best information otherwise available." 19 U.S.C. § 1677e(c) (1988). These "BIA rules" were among the "administrative reforms" enacted by Congress in the Trade Agreements Act of 1979, Pub. L. No.

96-39, in an effort to reduce the length of antidumping and countervailing duty investigations, which was often attributable to the delay in the assessment and collection of data. See H.R. Rep. No. 317, 96th Cong., 1st Sess. 24 (1979).

The implementing regulation promulgated by the ITA tracks the statutory provision covering the use of the best information available. See 19 C.F.R. § 353.37(a) (1992). In addition, the regulation provides that where an interested party "refuses to provide factual information requested by the [ITA] or otherwise impedes the proceeding, the [ITA] may take that into account in determining what is the best information available." 19 C.F.R. § 353.37(b) (1992). Thus, in addition to evaluating the adequacy of the response, the regulation allows the ITA to consider the degree of a particular respondent's cooperation in the administrative review as a factor in determining what constitutes the best information available. Cf. Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560, 2 Fed. Cir. (T) 130, 134 (1984) ("[O]ne may view the best information rule . . . as an investigative tool, which that agency may wield as an informal club over recalcitrant parties whose failure to cooperate may work against their best interest.").

In giving effect to its regulation, the ITA had earlier consistently subscribed to a "BIA policy" in which it assigned to a nonresponsive firm the higher of the highest rate calculated in the current administrative review or the firm's own prior rate. That policy was recently articulated by the ITA as follows:

> When a company refuses to provide the information requested in a timely manner, or otherwise significantly impedes the [ITA's] review, the [ITA] assigns to that company the highest margin for the subject merchandise of (1) The highest margin calculated for that company in any previous review; (2) the highest margin calculated for any respondent that supplied adequate responses in this review; or, (3) the

> margin for that company calculated in the less than fair value (LTFV) investigation.

Cyanuric Acid From Japan; Final Results of Administrative Review, 56 Fed. Reg. 2741, 2742 (Dep't Comm. Jan. 24, 1991) (emphases added).[1] We have previously accepted this approach as a reasonable and permissible interpretation of the BIA statute because it encourages the timely submission of pertinent data and "implements the basic purpose of the statute--determining current margins as accurately as possible." Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

New BIA Methodology

The ITA departed from its prior BIA policy by employing, for the first time in its administrative review of antidumping duty orders covering antifriction bearings, a "two-tier BIA methodology." The methodology has been described as a "new policy for dealing with firms that refuse to cooperate with the [ITA] or otherwise significantly impede the proceedings." Final Results of Antidumping Duty Administrative Review: Clear Sheet Glass From Taiwan, 56 Fed. Reg. 44075 (Dep't Comm. Sept. 6, 1991).

Under the new BIA scheme, when a respondent refuses to cooperate with the ITA's requests for information or significantly

---

[1] Thus, under the prior BIA selection method, margins of 65.13% and 17.31% would have been assigned to SNFA's ball bearing and cylindrical roller bearing entries, respectively. Those margins (which are the "all others" margins in the LTFV investigation) are higher than the highest respective margins calculated for any respondent in the administrative review. Note that the margins of 66.42% and 18.37% assigned to INA-France during the review are not considered under this method because that firm did not supply an adequate response.

impedes the administrative review, the ITA selects the higher of the highest rate assigned for any firm in the LTFV investigation or the highest rate calculated in the administrative review. This "first tier" treatment results in the selection of the most adverse margin possible as the best information available. In contrast, respondents who substantially cooperate but nonetheless fail to provide the requested information in a timely manner or in the required form are subject to a "second tier," which is substantively similar to that of the ITA's prior BIA policy. When the second tier is employed, the ITA assigns to a respondent the higher of its own prior LTFV rate or the highest rate calculated in the current administrative review.

The critical difference in BIA treatment under the first and second tiers lies in the range of LTFV margins subject to consideration as the best information available. Under the first tier, the ITA may consider the margin of any company involved in the prior LTFV investigation. Under the second tier, the ITA may only consider a particular firm's own prior LTFV rate. The difference has significant consequences when the BIA scheme is actually employed. Although each tier requires the ITA to choose the higher of a certain LTFV rate and the highest review rate, the ITA has acknowledged that in practice, "generally the highest rate for any company from the less than fair value (LTFV) investigation" is used for the best information available under the first tier and that under the second tier, "generally the highest rate found for any company in these reviews" is used. 56 Fed. Reg. 11179.

Allied-Signal asserts that the two-tier methodology adopted by the ITA in determining the best information available is not in accordance with law because it focuses on a respondent's level of cooperation, as perceived by the ITA, and is used by the agency to punish noncompliance. In particular, Allied-Signal argues that the first tier precludes the ITA from making an accurate determination of current margins because it forces the agency to "blindly" select the most adverse margins as the best information

available and to ignore the most recent information submitted during the administrative review. We disagree.

Although Congress expressly mandated that the ITA use the best information available when faced with a party who is unwilling or unable to participate in the administrative review proceedings, it did not explicitly define what type of information constituted the "best" information.[2] Hence, because Congress has "explicitly left a gap for the agency to fill" in determining what constitutes the best information available, the ITA's construction of the statute must be accorded considerable deference. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

We reject Allied-Signal's charge that rates derived from the new methodology are necessarily punitive rather than based on the best information. As we stated in Rhone Poulenc, Inc. v. United States, 899 F.2d 1185 (Fed. Cir. 1990), "[i]n order for the agency's application of the best information rule to be properly characterized as 'punitive,' the agency would have had to reject low margin information in favor of high margin information that was demonstrably less probative of current conditions." Id. at 1190. The new BIA scheme, like its predecessor, merely establishes a presumption that the highest prior margins are the best information available. That presumption can be rebutted by the respondent with evidence showing the actual margin to be less. See id.

Additionally, the ITA's new policy is consistent with the statutory purpose underlying the BIA rules provided in 19 U.S.C. § 1677e, which is to facilitate the determination of dumping margins as accurately as possible within the confines of extremely

---

[2] The relevant legislative history offers little guidance, but it does indicate that Congress "intend[ed] that the [ITA] and the ITC should always use the most up-to-date information available." H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979).

short statutory deadlines. Under such circumstances, "cooperation by the parties to the [administrative review] is essential . . . to gather the data needed for an accurate determination." Atlantic Sugar, 744 F.2d at 1560. We have recognized that "the ITA cannot be left merely to the largesse of the parties at their discretion to supply the ITA with information. This is particularly the case when the ITA is attempting to obtain information to conduct statutorily mandated administrative reviews because unlike ITC, the ITA has no subpoena power." Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1571 (Fed. Cir. 1990).

By taking into account a respondent's degree of cooperation, the two-tier methodology induces the submission of timely, accurate, and complete information by respondents, who are often in the best position to obtain and compile such information. Additionally, by allowing the ITA to make the "common sense inference" that the highest prior margins are the most indicative of current market conditions, Rhone Poulenc, 899 F.2d at 1190, the ITA avoids rewarding the uncooperative and recalcitrant party for its failure to supply requested information. "An agency's own construction of its own regulations has been regarded as especially due . . . respect." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-67 (1980).

Accordingly, we hold that the new two-tier methodology adopted by the ITA and used in its administrative review of antidumping duty orders is a reasonable and permissible exercise of the ITA's statutory authority to use the best information available when a respondent refuses or is unable to provide requested information.

Application of BIA Methodology to SNFA

Having addressed the validity of the ITA's new BIA policy, we now turn to its application to SNFA's bearings. Allied-Signal argues that the ITA erred in its decision to apply the first tier of the BIA methodology. It contends that it did not refuse to cooperate with the ITA and that the circumstances

underlying its nonresponsiveness do not justify the application of the first tier. Based on our review of the record, we agree that the ITA erred in its application of the two-tier BIA methodology.

Whether the first or second tier properly applies to a nonresponsive respondent essentially turns on the level of cooperation exhibited by that respondent during the review. In order to apply the first tier to a particular respondent, the ITA must conclude that the respondent "refused to cooperate with the [ITA] or otherwise significantly impeded" the review. However, if the respondent "substantially cooperated . . . but failed to provide the information in a timely manner or in the form required," the second tier is applicable.

In the instant case the record is clear that SNFA did not refuse to cooperate. Prior to the initiation of the administrative review, officials from SNFA and the ITA discussed proposals for a simplified process of review for those companies like SNFA that were in the "all others" category of the LTFV investigation. SNFA concluded that it could not adequately respond to the questionnaire because the particular costing system it had in place and its limited accounting resources made compilation of constructed value data difficult. Additionally, its small-volume production of specialized, custom-made bearings allegedly led to an absence of home market sales data.

SNFA alerted the ITA to its difficulty in responding to the questionnaire and indicated its willingness to participate in a simplified review process. Although the ITA acknowledged as much in its correspondence with SNFA and expressed interest in seeking to accommodate SNFA, it ultimately concluded that SNFA had refused to cooperate. The ITA explained that it employed the first tier because

> SNFA did not provide a substantive response to our questionnaire. It responded to section A (general information) of the questionnaire, but did

> not respond to sections B, C, or D. This does not constitute a reasonable attempt by SNFA to comply with the [ITA's] requirements for conducting the review. The lack of information significantly impeded the [ITA's] investigation, since there was no basis for calculating actual dumping margins nor even data to consider.

56 Fed. Reg. 31706. However, in view of the undisputed fact that SNFA supplied as much of the requested information as it could and offered to provide the remaining information in a simplified form, we must conclude that it was unreasonable for the ITA to have characterized SNFA's behavior as a refusal to cooperate.

Moreover, application of the first tier in SNFA's case does not promote the underlying objectives of the BIA rules. One of the fundamental purposes of the rules is to induce the timely submission of information to assist the ITA in determining accurate dumping margins. Thus, for example, the ITA may well have been justified in resorting to the first tier in selecting the best information available for bearings produced by INA Roulements S.A. after it announced that it would not participate in the administrative review and accordingly did not respond to the questionnaire at all. 56 Fed. Reg. 11179. In contrast, SNFA stated its willingness to cooperate and responded with the requested information to the extent it could.

Neither is the goal of encouraging future compliance furthered by the application of the first tier to SNFA, because it apparently has no ability to respond more completely than it already has done. SNFA failed to provide a complete response to the requested information because it was unable to, not because it refused to. SNFA will likely continue to be unable to adequately provide the requested data in future reviews unless a simplified process is established. Upon recognizing its institutional and financial limitations, SNFA offered an alternative proposal

involving the determination of new "all other" rates, based on information submitted during the review, for those small companies that found participation in a full review difficult and financially burdensome.

We hold that the ITA erred in employing the first tier of its two-tier methodology and that SNFA's bearings at issue are subject to second tier treatment. A dumping margin determination derived from an erroneous application of the ITA's own two-tier BIA methodology cannot be based on the "best information otherwise available" pursuant to section 1677e(c). Furthermore, by having ignored alternative and simplified reporting methods to generate relevant information, the ITA in the instant case may not have used the best information in assessing SNFA's dumping margins, as it is statutorily mandated to do. Accordingly, we reverse the judgment of the Court of International Trade affirming the ITA's final determination and remand the case to the court to direct the ITA to recalculate the dumping margins at issue under the second tier of the two-tier BIA methodology.

CONCLUSION

The two-tier BIA methodology employed by the ITA in selecting the best information available for nonresponsive parties is a permissible and reasonable exercise of its statutory authority. However, the ITA's final determination covering SNFA's entries of antifriction bearings for the period under review was based on a misapplication of that methodology and thus was not in accordance with law. Therefore, we reverse the judgment of the Court of International Trade and remand for further proceedings consistent with this opinion.

COSTS

No costs.

REVERSED AND REMANDED

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

July 1, 1993

ERRATA

Appeal No. 93-1049, Allied-Signal Aerospace Company, Garrett Engine Division and Garrett Auxiliary Power Division v. The United States, and The Torrington Company and Federal-Mogul Corporation

Decided: June 22, 1993 Precedential opinion

Please make the following correction:

Page 10, delete footnote 1 and renumber remaining footnotes accordingly.

APPENDIX G

Slip Op. 92-157

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: JUDGE NICHOLAS TSOUCALAS

ALLIED-SIGNAL AEROSPACE COMPANY, GARRETT ENGINE DIVISION AND GARRETT AUXILIARY POWER DIVISION, Plaintiff,	
v.	Court No. 91-08-00571
UNITED STATES, Defendant,	
THE TORRINGTON COMPANY, Defendant-Intervenor,	
FEDERAL-MOGUL CORPORATION, Defendant-Intervenor.	

Pursuant to Rule 56.1 of the Rules of this Court, plaintiff moves for judgment on the agency record claiming that the Department of Commerce, International Trade Administration's ("Commerce") determination was unsupported by substantial evidence and not in accordance with law. Specifically, plaintiff claims that, in calculating plaintiff's dumping margins, Commerce

punitively applied as best information available the highest of other companies' dumping rates from an earlier less than fair value investigation, rather than rates from the current administrative review.

Held: Plaintiff's motion is denied as Commerce was justified in its selection of best information available since responses to Commerce's questionnaire were inadequate and since plaintiff offered no evidence showing that recent margins were more probative of current conditions than the highest prior margins.

[Plaintiff's motion for judgment on the agency record denied; case dismissed.]

Dated: September 17, 1992

Adduci, Mastriani, Meeks & Schill (Louis S. Mastriani and Gregory C. Anthes) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Velta A. Melnbrencis); of counsel: John D. McInerney, Senior Counsel, and Craig R. Giesze, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine and Robert A. Weaver) for the Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley and Joseph A. Perna, V) for Federal-Mogul Corporation.

OPINION

TSOUCALAS, Judge: Pursuant to Rule 56.1 of the Rules of this Court, plaintiff, Allied-Signal Aerospace Company, Garrett Engine Division and Garrett Auxiliary Power Division ("Allied-Signal"), moves for an order granting judgment on the agency record. Allied-Signal is an importer of bearings manufactured by SNFA Bearings, Ltd. ("SNFA"). This motion challenges the final administrative determination of the Department of Commerce, International Trade Administration ("Commerce" or "ITA") for antifriction bearings from France. Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Final Results of Antidumping Duty Administrative Reviews ("Final Results"), 56 Fed. Reg. 31,748 (1991).

Background

In May 1989, the ITA published Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France ("LTFV determination"), 54 Fed. Reg. 19,092 (1989). In this LTFV determination, the ITA assigned antidumping duty margins to French companies that exported antifriction bearings including SNFA.

In May 1990, the ITA published a notice of an opportunity to request administrative reviews of the antidumping orders on antifriction bearings. Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 55 Fed. Reg. 19,093 (1990). In June 1990, the ITA initiated reviews of the antidumping duty orders on antifriction bearings from France, including plaintiff's imports. Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews, 55 Fed. Reg. 23,575 (1990).

The final results of the administrative review at issue were published in July 1991. Final Results, 56 Fed. Reg. at 31,748. In the Final Results, the ITA resorted to best information available and selected the highest dumping margins of any company from the LTFV determination. Antifriction Bearings (Other Than Tapered Roller Bearings and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Issues Appendix"), 56 Fed. Reg. 31,692, 31,705 (1991). These dumping margins were 66.42% for ball bearings and 18.37% for cylindrical roller bearings. Final Results, 56 Fed. Reg. at 31,750. Plaintiff claims that Commerce "punitively" applied as best information available the highest dumping rates from the LTFV determination, rather than rates from the current administrative review. Commerce, however, claims that its decision was reasonable since plaintiff offered no evidence indicating that recent margins were more probative of current market conditions than the other companies' dumping rates from the less than fair value investigation. Oral argument was heard by this Court on September 15, 1992.

DISCUSSION

Pursuant to the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B) (1988 & 1992 Supp.), in reviewing a final ITA determination, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

Best Information Available

It is firmly established that "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly

impedes an investigation, [the ITA shall] use the best information otherwise available." See 19 U.S.C. § 1677e(c) (1992 Supp.);[1] see also Technoimportexport v. United States, 15 CIT ___, ___, 766 F. Supp. 1169, 1176 (1991); N.A.R., S.p.A. v. United States, 14 CIT ___, ___, 741 F. Supp. 936, 941 (1990).

In the case at hand, Commerce resorted to best information available to calculate dumping margins because SNFA provided inadequate responses to Commerce's questionnaire. Plaintiff, Allied-Signal, does not contest Commerce's use of the best information available rule. It does, however, contest Commerce's selection of best information available. Plaintiff argues that in its determination Commerce punitively used the highest margins of other companies' dumping rates from the LTFV determination, rather than rates from the current administrative review.

Defendant, and defendant-intervenors, Federal-Mogul Corporation ("Federal-Mogul") and The Torrington Company ("Torrington"), each claim that Commerce's decision was reasonably within its broad discretion in selecting the best information available. Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Administrative Record at 9-10; Opposition of Defendant-Intervenor, The Torrington Company, to Plaintiff's Motion for Judgment Upon an Agency Record at 6-8; Opposition of Defendant-Intervenor Federal-Mogul Corporation to Plaintiff's Motion for Judgment Upon an Agency Record at 3-4.

The best information available provision is indeed broadly written and is intended to grant Commerce considerable discretion in determining what constitutes the best information available. Tai Yang Metal Indus. Co. v. United States, 13 CIT 345, 349-50, 712 F. Supp. 973, 977 (1989); Chemical Prods. Corp. v. United

---

[1] Formerly found at 19 U.S.C. § 1677e(b) (1988).

States, 10 CIT 626, 632-33, 645 F. Supp. 289, 294-95 (1986), remand order vacated, 10 CIT 819, 651 F. Supp. 1449 (1986). In fact, the information that Commerce ultimately selects as the best information available is "not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information." Asociacion Colombiana de Exportadores de Flores v. United States, 13 CIT 13, 28, 704 F. Supp. 1114, 1126 (1989), appeal after remand, 13 CIT 526, 717 F. Supp. 834 (1989), aff'd, 901 F.2d 1089 (Fed. Cir. 1990), cert. denied sub nom. Floramerica, S.A. v. United States, 111 S. Ct. 136 (1990).

In Rhone Poulenc, Inc. v. United States, 13 CIT 218, 710 F. Supp. 341 (1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990), the court clearly exemplified the broad discretion afforded to the ITA when it selects best information available. This Court asserted in Rhone Poulenc, that "[o]nce Commerce has exercised its discretion to use the best information available rule against a respondent, it is for Commerce, not the respondent, to determine what is the best information." Id. at 224, 710 F. Supp. at 346. In Rhone Poulenc, the ITA likewise applied as best information available the highest margin (60%) from the LTFV determination rather than the margin from the current administrative review, and this Court deemed that selection reasonable. Id. at 225, 710 F. Supp. at 347. The Court of Appeals for the Federal Circuit affirmed this decision because "Rhone Poulenc offered no evidence showing that recent margins were more probative of current conditions than the highest prior margin . . . ." Rhone Poulenc, 899 F.2d at 1190.

Similarly, the ITA in this case selected the highest prior margins as best information available. Allied-Signal assumed that because the ITA was reviewing several other countries' antifriction bearing sales from the same time period, this information was more representative of current market conditions than the LTFV information. Plaintiff's Motion for Judgment Upon an Agency Record at 26-27. Allied-Signal, however, like Rhone Poulenc, offered no evidence to support this assumption.

Furthermore, Commerce explained its reasoning for its selection of best information available at the administrative level. Issues Appendix, 56 Fed. Reg. at 31,704-06. The ITA stated that for the purpose of its final results, it applied two tiers of best information available as follows:

> 1. When a company refused to cooperate with the Department or otherwise significantly impeded these proceedings, we have used as BIA the higher of: (1) The highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less than fair value investigation (LTFV) or (2) the highest rate found in this review for the same class or kind of merchandise in the same country of origin.
>
> 2. When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we have used as BIA the higher of: (1) The firm's LTFV rate for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

Id. at 31,705.

The ITA stated that it applied the first tier of best information available because SNFA "responded to section A (general information) of the questionnaire, but did not respond to sections B, C, or D" and this "lack of information significantly impeded the Department's investigation." Id. at 31,706.

Plaintiff claims that this explanation is insufficient and does not justify resorting to the highest rates from the LTFV determination. This Court disagrees. Nevertheless, a court may "uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned." Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (quoting Bowman Transportation v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974)).

Furthermore, Commerce's two-tier best information available methodology employed in this case supports the reasonableness of the agency's actions. First, the methodology measured the level of cooperation exhibited by a respondent--a factor which the ITA is expressly allowed to consider in determining what to use as best information available. See 19 C.F.R. § 353.37(b) (1992).[2] This permitted the ITA to send a strong message to non-respondents like SNFA that "'failure to cooperate may work against their best interest.'" Rhone Poulenc, 899 F.2d at 1191 (quoting Atlantic Sugar v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984)). Secondly, this methodology enabled the ITA to determine what best information available to use in an expeditious manner, thus allowing the ITA to complete administrative proceedings within tight statutory deadlines. See, e.g., N.A.R., 14 CIT at ___, 741 F. Supp. at 941. Thus, the use of this methodology allowed the ITA to make a reasonable selection of best information available.

Regarding Allied-Signal's claim that Commerce "punitively" applied the best information rule because it selected the highest margin, the Federal Circuit in Rhone Poulenc explained the circumstances in which it considered the application

---

[2] 19 C.F.R. § 353.37(b) states that "[i]f an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available."

of best information available to be punitive. The plaintiff in that case likewise argued that Commerce "sought out the most punitive information, rather than the best information," when it resorted to the highest prior margin as best information available. Rhone Poulenc, 899 F-2d at 1190 (emphasis in original). Although the Federal Circuit declined to explicitly decide whether the ITA may use the best information available rule to "penalize" a party, it explained that best information available is characterized as "punitive" when the ITA rejects low margin information in favor of high margin information that is "demonstrably less probative of current conditions." Id.

In this case, as previously mentioned, Allied-Signal did not offer evidence to show that the margins from the LTFV determination were demonstrably less probative of current market conditions than the administrative review margins. Moreover, "the use of the highest prior margin as BIA is not punitive, rather there is a presumption that it 'is the most probative evidence of current margins.'" Neuweg Fertigung GmbH v. United States, 16 CIT ___, ___, Slip Op. 92-137 at 12 (August 20, 1992) (quoting Rhone Poulenc, 899 F.2d at 1190). Therefore, Commerce's selection of the LTFV rates were not "punitive," but rather were reasonable and in accordance with law.

CONCLUSION

Commerce was justified in resorting to the best information available rule since SNFA failed to complete Commerce's questionnaire. Furthermore, Commerce reasonably applied as best information available the highest of the other companies' dumping rates from the earlier LTFV determination since plaintiff offered no evidence proving that recent margins

were more probative. Therefore, Commerce's determination is affirmed in all respects and this case is dismissed.

s/Nicholas Tsoucalas
NICHOLAS TSOUCALAS
JUDGE

Dated: September 17, 1992
New York, New York

JUDGMENT

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: JUDGE NICHOLAS TSOUCALAS

ALLIED-SIGNAL AEROSPACE COMPANY, GARRETT ENGINE DIVISION AND GARRETT AUXILIARY POWER DIVISION,	:	
Plaintiff,	:	
v.	:	Court No. 91-08-00571
UNITED STATES,	:	
Defendant,	:	
THE TORRINGTON COMPANY,	:	
Defendant-Intervenor,	:	
FEDERAL-MOGUL CORPORATION,	:	
Defendant-Intervenor.	:	

This case having been duly submitted for decision following plaintiff's motion for judgment on the agency record, pursuant to Rule 56.1 of the Rules of this Court, and the Court, after due deliberation, having rendered a decision herein; now then, in accordance with said decision,

IT IS HEREBY ORDERED that plaintiff's motion is denied; and it is further

ORDERED that the determination of the Department of Commerce, International Trade Administration, is affirmed in all respects, and it is further

ORDERED that this case is dismissed.

s/Nicholas Tsoucalas
NICHOLAS TSOUCALAS
JUDGE

Dated: September 17, 1992
New York, New York

APPENDIX H

[A-427-801]

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Final Results of Antidumping Duty Administrative Reviews

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative reviews.

SUMMARY: On March 15, 1991, the Department of Commerce published the preliminary results of its administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof (AFBs), from France (56 FR 11178). The classes or kinds of merchandise covered by these reviews are ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof. The reviews cover 10 manufacturers/exporters and the period November 9, 1988 through April 30, 1990.

Based on our analysis of the comments received and the correction of certain inadvertent programming and clerical errors, we have changed the preliminary results. The final margins for the reviewed firms for each class or kind of merchandise are listed below in the section "Final Results of Review."

EFFECTIVE DATE: July 11, 1991.

FOR FURTHER INFORMATION CONTACT: Michael Diminich (SKF France, SARMA, and ADR), Thomas McGinty (SNECMA, Dowty Rotol, Turbomeca, Aerospatiale, and Fiat), Maureen McPhillips (SNR and INA Roulements), Laurel Lynn (Pratt & Whitney), Ileana Crowley, or Richard Rimlinger, Office of Antidumping Compliance, International Trade Administration,

U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-1130.

SUPPLEMENTARY INFORMATION:

Background

On June 11, 1990, in accordance with 19 CFR 353.22(c), the Department of Commerce (the Department) initiated administrative reviews of the antidumping duty orders on ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof, from France for the period November 9, 1988 through April 30, 1990 (55 FR 23575).

On March 15, 1991, we published the preliminary results, and termination in part, of these administrative reviews (56 FR 11178). We gave interested parties an opportunity to comment on our preliminary results. At the request of certain interested parties, we held public hearings during the week of April 22, 1991. Because there are concurrent administrative reviews of imports of AFBs from nine countries, we held a hearing on general issues pertaining to all nine countries on April 22, 1991, and a country-specific hearing for France on April 23, 1991.

Issues Appendix

All issues raised in the case and rebuttal briefs by parties to the nine concurrent administrative reviews of AFBs are addressed in the "Issues Appendix" which is appended to the "Notice of Final Results of Review: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany" which is published concurrently with this notice (hereinafter "Issues Appendix"). The first part of the Issues Appendix addresses all general issues raised in these reviews, and our determinations with respect to each issue. The next part addresses all remaining comments filed by the parties to these proceedings according to subject and then by company within each

subject. See the Table of Contents to the Issues Appendix for a complete listing of all issues raised and addressed.

Scope of Reviews

The products covered by these reviews are antifriction bearings (other than tapered roller bearings), and parts thereof, and constitute the following "classes or kinds" of merchandise: ball bearings and parts thereof (BBs), cylindrical roller bearings and parts thereof (CRBs), and spherical plain bearings and parts thereof (SPBs). For a detailed description of the products covered under BBs, CRBs, and SPBs, please see the section on "Scope" in the Issues Appendix.

Reporting Requirements

Our review of the information provided on the record by respondents disclosed that there were millions of AFB sales to the United States, the home market and third countries during the period of review (POR). The enormous number of transactions, coupled with the fact that reviews were requested for over sixty foreign producers and exporters, underscored the need to formulate a reasonable sampling methodology in order for the parties and the Department to cope with the resultant costs and administrative burdens.

In response to these problems, and after carefully considering comments on, and suggested alternatives to, our initial sampling proposal, we adopted a sampling plan as authorized under section 777A of the Tariff Act of 1930, as amended (the Act). Under this plan (see "Memorandum to File" dated August 27, 1990), respondents with over 2000 exporter's sales price (ESP) transactions for any class or kind of merchandise were requested to submit data for all U.S. sales of this class or kind that were made during a selected sample of nine one-week periods. These nine weeks were chosen at random, one from each two-month interval during the POR. For each U.S. sale reported during the selected weeks, we requested that respondents report all

sales of identical and similar AFBs sold in the home market during the month corresponding to the sample week for U.S. sales. The dumping margins calculated for this sample group of ESP sales were weight-averaged with the dumping margins for purchase price transactions to calculate each respondent's overall dumping margin.

No comments were received from interested parties concerning the basic validity of our sampling process.

Best Information Available

In accordance with section 776(c) of the Act, we have determined that the use of best information otherwise available (BIA) is appropriate for several firms. For certain firms, total BIA was necessary, while for other firms, only partial BIA was applied. For a discussion of our general application of BIA, see the section on "Best Information Available" in the Issues Appendix. The firms to which total BIA was applied are also identified in the "Best Information Available" section of the Issues Appendix.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made the following changes in these final results.

- Where applicable, certain programming and clerical errors in our preliminary results have been corrected. Any alleged programming or clerical errors pertaining to the calculation and treatment of charges and adjustments, cost of production and constructed value with which we do not agree are discussed in the relevant sections of the Issues Appendix.

- In accordance with section 773(b) of the Act, in determining whether to disregard home market sales made at prices below the cost of production, we examined whether such sales have been made in substantial quantities over an extended

period of time. When less than 10 percent of the home market sales of each model were at prices below the cost of production, we did not disregard any sales and made normal price-to-price comparisons. When more than 10 percent, but less than 90 percent of the home market sales of a particular model were determined to be below cost, we excluded the below-cost home market sales from our calculation of FMV provided that these below cost sales were made over an extended period of time. When more than 90 percent of the home market sales of a particular model were made below cost over an extended period of time, we disregarded all home market sales of that model for purposes of calculating foreign market value (FMV).

No home market below-cost sales were disregarded unless they were determined to be over an extended period of time.

We have determined that the threshold for "extended period of time" is met when there are below-cost home market sales in more than two months of the POR. We made an exception to this threshold requirement when a particular model was sold in less than three months during the POR. In such cases, where sales below cost occurred in each of the months in which such models had been sold, we concluded that these sales of particular models had been made below cost over an extended period of time.

Home market sales of obsolete merchandise and distress sales were not disregarded from our analysis unless there was documented information on the record demonstrating that such sales were outside the ordinary course of trade.

Since none of the respondents has submitted information indicating that any of its sales below cost were at prices which would have permitted "recovery of all costs within a reasonable period of time in the normal course of trade," we are unable to conclude that the costs of production of such sales have been recovered within a reasonable period. For a more complete discussion of our determination with respect to the cost of

production test, see the section on "Cost of Production" in the Issues Appendix.

• For our preliminary results, we compared U.S. and home market sales at the same level of trade. If we did not find contemporaneous sales of such or similar merchandise at the same level of trade, we used constructed value (CV), as the basis for FMV. However, as a result of our review of comments filed by the parties to these proceedings, we have changed our comparison procedures.

For purposes of these final results of review, we first sought contemporaneous sales of identical merchandise at the same level of trade in the home market as that of the U.S. sale. If we were unable to find a match, we then looked for contemporaneous sales of identical merchandise at the next level of trade. (Our analysis of the various levels of trade reported by the respondents led us to conclude that sales of AFBs are made at two levels of trade: (1) original equipment manufacturers, and (2) distributors, retailers and aftermarket sellers.) If we were unable to find identical matches at the next level of trade, we then sought contemporaneous home market sales of the same family as the U.S. bearing at the same level of trade. If unsuccessful, we then sought contemporaneous home market sales of the same family at the next level of trade before using CV as the basis for FMV (see the section on "Level of Trade" in the Issues Appendix).

• Based on our analysis of comments filed by parties to these proceedings, we have modified or altered our treatment of certain charges and adjustments. These modifications or alterations are discussed in the relevant sections of the Issues Appendix. The most significant modification pertains to our treatment of value-added taxes (VAT) and consumption taxes. Under section 772(d)(1)(c) of the Act, U.S. price must be increased by the "* * * amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to

the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation." Accordingly, we have calculated an amount for the VAT or consumption tax, and added it to U.S. price. In order to ensure tax-neutral results, we have made a circumstance of sale adjustment to the home market price. When home market prices were reported net of VAT or consumption tax, we were able to effect a circumstance of sale adjustment by adding the amount of the tax calculated for the U.S. sale to the home market price. For a more complete discussion of our treatment of these taxes, see the section on "Value-Added Taxes" in the Issues Appendix.

Analysis of Comments Received

See the Issues Appendix which is appended to the "Notice of Final Results of Review: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany" which is published concurrently with this notice.

Final Results of Review

We determine the following percentage margins to exist for the period November 9, 1988 through April 30, 1990.

Company	Ball Bearings	Cylindrical Roller Bearings	Spherical Plain Bearings
SKF-France SARMA, ADR	7.79	[1]	26.31
SNECMA	0.21	0.24	[2]
FiatAvio	0.00	[1]	[2]
ADH	2.64	3.15	4.87
Turbomeca	6.85	10.63	[1]
Pratt & Whitney Canada, Inc.	4.33	2.07	[1]
SNR	2.03	1.08	[1]
INA-France	66.42	18.37	39.00
SNFA	66.42	18.37	[2]
Dowty Rotol	0.00	[1]	[2]
All Others	7.79	10.63	26.31

[1] No sales to the U.S. during the period.
[2] Not subject to review.

Cash Deposit Requirements

To calculate the cash deposit rate for each respondent, we divided the total potential uncollected dumping duties (PUDD) for each exporter by the total net USP value for that exporter's sales during the review period under each order. In order to derive a single deposit rate for each class or kind of merchandise for each respondent (i.e., each exporter or manufacturer included in these reviews), we weight-averaged the purchase price (PP) and exporter's sales price (ESP) deposit rates (using the combined U.S. value of PP sales and ESP sales as the weighting factor). To accomplish this where we sampled ESP sales, we first approximated a total PUDD for all ESP sales by dividing the sample ESP PUDD by the ratio of sampled weeks to total weeks in the review period. We then approximated a total net USP value

for all ESP sales during the review period by dividing the sampled ESP total net value by the ratio of sampled weeks to total weeks in the review period.

We will direct Customs to collect the resulting percentage deposit rate against the entered Customs value of each of the exporter's entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after, the date of publication of this notice.

Entries of parts incorporated into finished bearings before sales to an unrelated customer in the United States will receive the exporter's deposit rate for the appropriate class or kind of merchandise.

Entries of products subject to the orders that had passed through foreign trade zones (FTZs) before entry into U.S. Customs territory will be treated the same as other entries of products subject to the orders to the extent that such treatment is not inconsistent with our handling of FTZs. See the section on "Foreign Trade Zones" in the Issues Appendix.

The following deposit requirements will be effective for all shipments of French-origin antifriction bearings (other than tapered roller bearings) and parts thereof, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of these administrative reviews, as provided by section 751(a)(1) of the Act:

(1) For the reviewed companies, the cash deposit rate will be that established in the final results these reviews;

(2) For merchandise exported by manufacturers or exporters not covered in these reviews, but covered in the final determinations of sales at less than fair value (the LTFV investigations), the cash deposit rate will continue to be the rate published in the final determinations in the LTFV investigations;

(3) If the exporter is not a firm covered in these reviews or the original investigations, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise in the final results of these reviews or, if not covered in these reviews, the rate from the LTFV investigations;

(4) The cash deposit rate for all other manufacturers which export the subject merchandise shall be the "All Others" rate listed in the section "Final Results of Review" above for each class or kind of merchandise.

These deposit requirements shall remain in effect until publication of the final results of the next administrative reviews. All comments submitted concerning the calculation of the cash deposit rates are addressed in the section on "Assessment and Cash Deposit Rates" in the Issues Appendix.

Assessment Rates

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Because sampling and other simplification methods prevent us from doing entry-by-entry assessments, we will calculate where possible, an exporter/importer-specific assessment rate for each class or kind of antifriction bearings. In our preliminary results of review (56 FR 11178), we stated that we would calculate this exporter/importer-specific rate based on the ratio of the total value of dumping duties calculated for the sales examined in the review period to the total entered customs values of those sales. We stated that this rate would be assessed uniformly on all entries of the class or kind of merchandise by that particular importer during the review period. We also stated that where we did not have entered customs value for all merchandise examined during the review period, we would calculate an average per-unit dollar amount of antidumping duty based on all sales examined during the review period.

Based on comments received from interested parties and our analysis of the information on the record, we have modified the methodology described in the preliminary results. For purposes of these final results, assessment rates will be calculated as follows.

1. *Purchase Price Sales.* With respect to purchase price sales for these final results, we will divide the total PUDD (calculated as the difference between foreign market value and U.S. price) for each importer by the total number of units sold to that importer. We will direct Customs to assess the resulting unit dollar amount against each unit of subject merchandise in each of that importer's entries under the relevant order during the review period. Although this will result in assessing different percentage margins for individual entries, the total antidumping duties collected for each importer under each order for the review period will be almost exactly equal to the total PUDD, which is the correct assessment amount.

2. *Exporter's Sales Price Sales.* For ESP sales (sampled and non-sampled), we will divide the total PUDD for the reviewed sales by the total entered value of those reviewed sales, for each importer. We will direct Customs to assess the resulting percentage margin against the entered Customs value of the subject merchandise in each of that importer's entries under the relevant order during the review period. Although this approach will result in the assessment of a dumping margin based, to some extent, on sales of merchandise imported outside the POR, it is the most accurate rate that can be calculated on the basis of the information on the record.

In the case of companies which did not report entered value of sales, we will calculate a proxy for entered value of sales, based on the price information available and appropriate adjustments (*e.g.*, insurance, freight, U.S. brokerage and handling, U.S. profit, and any other items, as appropriate, on a company-specific basis).

For calculation of the ESP assessment rate, entries for which liquidation was suspended, but which ultimately fell outside the scope of the orders through operation of the "Roller Chain" rule, will be included in the assessment rate denominator to avoid over-collecting. (The "Roller Chain" rule excludes from the scope of an order bearings which were imported by a related party and further-processed, and which comprise less than one percent of the finished product sold to the first unrelated customer in the United States. *See* the section on "Roller Chain" in the Issues Appendix.) Entries of parts incorporated into finished bearings before sale to an unrelated customer in the United States will be assessed the importer's weighted-average margin for the appropriate class or kind of merchandise.

3. *Other Assessment Instructions.* In the case of companies which chose to respond to the price list option (see Preliminary Results of Antidumping Duty Reviews: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof, from the Federal Republic of Germany, 56 FR 11200), we will calculate an *ad valorem* assessment rate by dividing PUDD by a proxy for entered value of sales. The proxy will be calculated based on the price information available and appropriate adjustments (*e.g.*, insurance, freight, U.S. brokerage and handling, U.S. profit, and any other items, as appropriate, on a company-specific basis).

Entries of products subject to the orders that had passed through a foreign trade zone before entry into U.S. Customs territory will be treated the same as other entries of products subject to the orders to the extent that such treatment is not inconsistent with our approach to FTZs. See the section on "Foreign Trade Zones" in the Issues Appendix.

When we refer to importers, we are referring to the U.S. customer, whether related or unrelated to the exporter, not the customs broker or brokerage house that might be the importer of record for any of these entries. Our liquidation instructions to

Customs will identify the customer that these notices refer to as the importer.

The comments made by interested parties concerning the calculation of assessment and cash deposit rates are addressed in the "Assessment and Cash Deposit Rates" section of the Issues Appendix.

These administrative reviews and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and § 353.22 of the Department's regulations (19 CFR 353.22 (1990)).

Dated: June 27, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91-16161 Filed 7-10-91; 8:45 am]
BILLING CODE 3510-DS-M

APPENDIX I

[NOTE: DUE TO THE LENGTH OF THIS PUBLISHED DETERMINATION, PETITIONER HAS INCLUDED ONLY THE RELEVANT PORTIONS OF THE ITA'S ISSUES APPENDIX.]

DEPARTMENT OF COMMERCE

International Trade Administration

[A-428-801]

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative reviews.

* * * *

(Text Deleted)

* * * *

Issues Appendix

All issues raised in the case and rebuttal briefs by parties to the nine concurrent administrative reviews of AFBs are addressed in the "Issues Appendix" which is appended to this notice of final results. The first part of the Issues Appendix addresses all general issues raised in these reviews, and our determinations with respect to each issue. The next part addresses all remaining comments filed by the parties to these proceedings according to subject and then by company within each subject.

See the Table of Contents to the Issues Appendix for a complete listing of all issues raised and addressed.

* * * *

(Text Deleted)

* * * *

Best Information Available

In accordance with section 776(c) of the Act, we have determined that the use of best information otherwise available (BIA) is appropriate for several firms. For certain firms, total BIA was necessary, while for other firms, only partial BIA was applied. For a discussion of our general application of BIA, see the section on "Best Information Available" in the Issues Appendix. The firms to which total BIA was applied are also identified in the "Best Information Available" section of the Issues Appendix.

* * * *

(Text Deleted)

* * * *

Section 5: Best Information Available (BIA)

Section 776(c) of the Act requires the Department to use the best information available "whenever a party or any other person refuses or is unable to produce information requested in a timely manner or in the form required, or otherwise significantly impedes an investigation." In deciding what to use as best information available, the Department's regulations provide that the Department may take into account whether a party refuses to provide requested information (19 CFR 353.37(b)). Thus, the Department may determine, on a case-by-case basis, what the best

information available is. For the purposes of these final results of review, we have applied two tiers of BIA:

1. When a company refused to cooperate with the Department or otherwise significantly impeded these proceedings, we have used as BIA the higher of: (1) The highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less than fair value investigation (LTFV) or (2) the highest rate found in this review for the same class or kind of merchandise in the same country of origin.

2. When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we have used as BIA the higher of: (1) The firm's LTFV rate for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

Listed below is a company-by-company summary of our use of total BIA applied in these final results of review. Total BIA was applied where we were unable to use a company's response for purposes of determining that company's dumping margin.

INA-France: INA did not respond to our questionnaire. Therefore, we applied the first tier of BIA as described above.

SNFA-France: SNFA responded only to section A of our questionnaire and provided no further responses. Therefore, we applied the first tier of BIA.

Somecat-Italy: Somecat provided a substantially inadequate response to our questionnaire. This inadequate response significantly impeded our review. Therefore, we applied the first tier of BIA.

Minebea-Japan: Minebea did not respond to our questionnaire. Therefore, we applied the first tier of BIA.

JAEC-Japan: JAEC provided a substantially inadequate response to our questionnaire. This inadequate response significantly impeded our review. Therefore, we applied the first tier of BIA.

Asahi-Japan: Asahi submitted responses to all sections of the questionnaire and agreed to undergo verification. However, at verification we discovered that the firm had inadvertently failed to report a substantial number of its U.S. sales. Given the degree of cooperation demonstrated by Asahi, we applied the second tier of BIA as described above. Since no calculated rate in this review exceeded the "all others" rate assigned to Asahi from the LTFV investigation, we used that rate as BIA.

NPB-Japan: NPB also responded to all sections of the questionnaire and agreed to undergo verification. However, at verification NPB was unable to support its cost allocations, and we were unable to test the firm's home market sales against below-cost sales allegations. Because NPB was cooperative in this review, we used the firm's previous rate (in this case the "all others" rate from the LTFV investigation) as BIA.

Meter-Italy: The Department required Meter to provide additional information concerning its sales of mast guide bearings to the United States based on a scope decision made concurrently with our preliminary results of review. Although Meter submitted a response in the limited time allowed prior to our final results, the response was inadequate. However, given that the scope issue was raised relatively late in these proceedings, and that entries of the mast guide bearings exported by Meter over the period of review have already been liquidated by U.S. Customs, we think it would be inappropriate to set Meter's cash deposit rate any higher than the highest rate calculated for an Italian company in this review for the same class or kind of merchandise. For Meter, due to these unusual circumstances and the degree of cooperation

demonstrated by the firm,we used the highest calculated rate for an Italian company for this review as BIA.

ZF: ZF supplied the Department with a substantially inadequate ESP response. Only after the preliminary results did ZF even attempt to submit an ESP response in the form requested by the Department. This submission was untimely, so we used the first tier of BIA, as described above, for ZF's ESP response.

In certain situations, we found it necessary to use partial BIA. Partial BIA was applied in cases where we were unable to use some portion of a response in calculating a dumping margin. The following is a general description of the Department's methodology for certain situations.

In cases where a firm failed to supply certain FMV information (i.e., corresponding home market sales within the contemporaneous window or constructed value data for a few U.S. sales), we generally used the following methodology:

1. If a firm failed to provide matching data for an insignificant portion by quantity of its reported U.S. sales, we used as BIA for those particular transactions the higher of (1) the firm's previous rate from the LTFV investigation (or, if the firm did not have an individual rate, the "all others" rate), or (2) the weighted-average margin for that firm from this review;

2. If a firm failed to provide matching data for a significant portion of its reported U.S. sales by quantity, we used as BIA for those particular transactions the higher of (1) the firm's previous rate (or "all others" rate) from the LTFV investigation, or (2) the highest calculated rate for any firm in this review.

For charges and adjustments, we assigned a value of zero as BIA to any adjustments and charges to home-market prices or CV, such as freight or differences in merchandise, which were missing from the sales listings. If adjustment information for differences in merchandise was missing from the U.S. sales

listing, we used the above to determine the BIA rates to use as the margins for these particular transactions. If other U.S. adjustment information such as freight charges were missing, we used other transactional information in the response to estimate these expenses.

The following comments were received concerning BIA issues:

Comment 1: Federal-Mogul argues that, wherever the information submitted by a respondent in these reviews is found to be inadequate, inaccurate, unsubstantiated, or unverifiable, the Department should use as BIA the highest margin found in the original investigation for any company. The application of less-adverse BIA for companies which appeared to cooperate, but nonetheless failed to provide reliable, substantiated information improperly "rewards" these respondents, because the submission of unverifiable information is itself a significant impediment to the Department. Furthermore, it suggests that a respondent may benefit by merely "going through the motions" or, worse, by submitting manufactured, self-serving data, which if not detected through verification would result in erroneously low margins.

Department's Position: When determining a margin based upon BIA for a respondent, in accordance with § 353.37(b) of the Department's regulations, for these final results we took into account whether that respondent refused to provide requested factual information or otherwise impeded a segment of the proceeding. For firms which failed to respond substantively or otherwise impeded these reviews, we assigned, as BIA, the highest of the rates, including BIA rates, determined for individual firms in the LTFV investigation or in the instant review for the same class or kind of merchandise and country of origin. We assigned a less-adverse BIA rate for firms whose submitted information was unverifiable due to demonstrably unintentional errors if the firm responded to all pertinent sections of the questionnaire and all requests for additional information in a timely manner and in the form required, provided sufficient information to merit

verification, and did not impede the review. For each of these firms that cooperated, we assigned, as BIA, the higher of the rate applicable to the particular firm from the original investigation or the highest weighted-average rate calculated for any individual firm in the relevant instant review.

Comment 2: Torrington argues that the Department should use BIA for particular sales or data whenever data are missing and particularly whenever U.S. transactions occur for which no home market prices or constructed value data were provided. The Department should use BIA to supply missing data, *i.e.*, information requested but not produced in a timely manner and in the form required, as stipulated by 19 U.S.C. 1677e(b). Where the missing information prevents the comparison of a particular U.S. transaction price to home-market prices or to constructed value or where the data for a necessary adjustment for differences in merchandise were not provided, the Department should use the rate determined for that respondent in the original investigation or the highest rate determined in this review period for a respondent whose data were complete and verified.

Torrington contends that failure to apply BIA where required data are missing allows the respondent to control aspects of the review and will encourage respondents to withhold information in the future whenever such omissions might result in lower dumping margins. For example, where NSK did not provide the variable cost of manufacturing (VCOM) of the U.S. product, the Department made no comparison to a home-market family and instead used constructed value. NSK thus controlled whether constructed value became the FMV for certain products. In addition, where GMN failed to report various adjustments to USP, the Department simply eliminated those U.S. sales from its margin calculations. Thus GMN controlled whether particular U.S. sales were used to calculate margins.

Federal-Mogul argues that the Department may not simply disregard SKF's U.S. sales for which the Department found no home-market price data or constructed value information. If the

information submitted by SKF is inadequate for purposes of establishing FMVs, the Department should apply BIA for those sales to complete its analysis.

Nankai Seiko argues that the Department's regulations permit the Department to take into account the degree of cooperation of a respondent in determining BIA for that respondent, and the Department's policy has been to do so. While the Department has a legitimate interest in deterring deliberate attempts by respondents to evade review, penalizing cooperative respondents for inadvertent failures to provide full information would undermine the Department's goal of encouraging active participation in the process. Nankai Seiko further argues that it cooperated fully and in good faith in this review. It failed to provide certain CV data only because of the complexity of the review, the language barrier, the company's inexperience with antidumping proceedings, and a genuine misunderstanding of the questionnaire.

Nachi argues that its unmatched sales did not result from missing data but from the Department's computer program. Nachi asserts that Torrington's comments concerning the use of BIA are not relevant to Nachi.

Department's Position: Contrary to Torrington's opinion, GMN did not fail to provide required data for adjustments to USP. Therefore, we did not use BIA for GMN sales on this basis.

We applied a less-adverse BIA rate, as discussed above, to those U.S. sales by Nankai Seiko for which no FMV data were provided. For Nachi, even after we revised the computer programs we still found unmatched sales. For these sales, we have used BIA as described above.

Comment 3: Allied-Signal argues that the Department should not impose a punitive BIA rate on SNFA, because SNFA attempted to cooperate fully with the Department. SNFA should not be subjected to the same punitive rate as respondents that

refused to cooperate and significantly impeded the Department's investigation as SNFA neither refused to cooperate nor significantly impeded the investigation.

GE also argues that the Department should not apply a punitive BIA rate to SNFA, because such a rate does not reflect the circumstances involved and unfairly punishes GE, which is not at fault.

Department's Position: SNFA did not provide a substantive response to our questionnaire. It responded to section A (general information) of the questionnaire, but did not respond to sections B, C, or D. This does not constitute a reasonable attempt by SNFA to comply with the Department's requirements for conducting the review. The lack of information significantly impeded the Department's investigation, since there was no basis for calculating actual dumping margins nor even data to consider.

Although Allied-Signal and GE, as interested parties, have expressed concern regarding SNFA's final result, SNFA is solely responsible for its participation in this review. Therefore, we can consider only the nature of SNFA's response to our questionnaire in determining the appropriate BIA rate to apply.

Accordingly, we used as BIA the highest rate determined for any individual firm in the original investigation with respect to the same class or kind of merchandise and country of origin.

Comment 4: Dowty argues that the Department should not use BIA for Dowty's sales of French AFBs, arguing that it provided all necessary USP and FMV information.

Department's Position: We agree that Dowty's response was adequate. For these final results, we used the information submitted by Dowty concerning its sales of AFBs from France.

Comment 5: NPB contests the Department's use of BIA in the preliminary results of review. NPB states that its basic

labor, overhead, selling, general and administrative expense data were verified; the verification report refers only to potential problems with the allocation methodology used for labor and overhead. Since NPB had no deficiencies in its response all data were verified, and only the allocation methodology for labor and overhead are at issue, the Department's use of a punitive, overall BIA rate which rejects use of that verified data indicates that the Department "applied its BIA authority in an arbitrary, capricious and unreasonable manner."

NPB contends that according to Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada; Final Results of Antidumping Duty Administrative Review, 55 FR 20176 (1990), the Department's criteria to determine whether to use BIA are completeness of the original and any supplemental responses, whether the Department gave the respondent adequate notice to correct any deficiencies, and timeliness of the deficiency response. In the case of minor omissions from a response, NPB argues, the Department has clearly stated that it may apply a partial BIA, but only to those omissions. In such a case rejection of the entire response is not warranted. NPB cites as support Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof from Japan; Final Results of Antidumping Duty Administrative Review, 55 FR 38720, 28728 [sic] (1990) (hereinafter TRBS); Certain Fresh Cut Flowers from Columbia; Final Results of Antidumping Duty Administrative Review, 55 FR 20491, 20494 (1990) (hereinafter Flowers). NPB argues, therefore, that the Department may not use BIA in lieu of verified data, even where the allocation methodology for that verified data is at issue. Since NPB does not maintain the books and records necessary to derive a more acceptable allocation methodology for labor and overhead expenses (it has only raw data from untabulated daily production reports) it should not be penalized for failing to provide information that it simply does not have. The Department's contention that NPB should have tabulated selected information from its 18 months of daily production reports (in one or two days of the verification)

constitutes the Department's requiring NPB to create new accounting records.

NPB contends that there is strong precedent for accepting allocations based on aggregated cost data when cost information cannot be disaggregated because a respondent's records are not maintained on a disaggregated basis. *See Atlantic Sugar, Ltd., et al. v. United States* 744 F.2d 1556 (1989) (herein after [sic] Atlantic Sugar); Offshore Platform Jackets and Piles from Japan: Final Determination of Sales at Less Than Fair Value, 51 FR 11788 (1986); Photo Albums and Filler Pages from Hong Kong, 50 FR 4375 (1985). NPB argues that if the Department continues to reject NPB's suggested alternatives it should develop its own methodology, using the verified data.

NPB further argues that in instances where companies had "not appropriately quantified or valued" certain costs (labor, overhead, G&A, interest expenses, selling expenses) the Department adjusted such items based on information from the financial statements. See Certain Valves and Connectors of Brass for Use in Fire Protection Systems from Italy, 55 FR 50342 (1990) (hereinafter Valves; Final Determination of Sales at Less Than Fair Value; Fresh and Chilled Atlantic Salmon from Norway, 56 FR 7661 (1991) (hereinafter Salmon).

NPB also notes that in the Final Determination of Sales at Less Than Fair Value; Sweaters Wholly or in Chief Weight of Man-Made Fibre from Taiwan; 55 FR 34585 (1990) (hereinafter Sweaters) where a cooperative company provided substantially complete and verified responses but failed to provide certain data, the Department used the highest calculated margin for any other company (with a verified response) in that review as BIA for that portion of the unverified sales. Thus, for NPB's labor and overhead, the Department should resort to BIA for only those items, not reject the entire response.

Finally, NPB notes that verification was originally scheduled for five days. After it had been rescheduled for 3.5

days the Department promised not to draw any adverse inferences regarding any data for which the Department was unable to complete verification. NPB alleges that this promise was not honored.

Department's Position: We disagree with NPB's contention that its basic labor, overhead, selling, general and administrative expense data were successfully verified. Although we were able to tie the aggregate labor, overhead and SG&A expenses from the monthly trial balance to the audited financial statements, we were not able to tie the reported model-specific amounts for these items to those internal accounting records and financial statements. Verification depends precisely on tying amounts reported in questionnaire responses to the company's internal accounting records and financial statements. Failure to demonstrate such a relationship results in a failed verification. In Valves and Salmon minor reallocations based on financial statement data were accepted because the respondents' questionnaire responses reconciled to the internal accounting records and financial statements. Unlike Valves and Salmon, and TRBs and Sweaters, where partial BIA was used to correct for minor omissions in the response, and Flowers where such minor omissions did not result in rejection of the entire response, NPB failed verification, in this case, verification of costs. In accordance with Department practice and policy, a failed verification is sufficient grounds for rejecting a response and resorting to BIA.

It is not the Department's policy to penalize respondents for not maintaining records in a manner that facilitates response to the antidumping questionnaire. When NPB explained its cost accounting system to the Department at verification, the Department attempted to work with NPB to devise an appropriate allocation methodology based on that system. However, due to problems addressed herein, the Department was unable to devise such an appropriate methodology at verification. Had NPB informed the Department of its unsophisticated cost accounting system prior to completing its questionnaire response, the

Department and NPB, at that time, might have been able to devise an appropriate allocation methodology for these expenses.

The Department's attempt to substantiate the accuracy of NPB's claimed labor and overhead expenses through the use of two months of the daily production reports should not be construed as a requirement by the Department that NPB create new accounting records. Since NPB was unable to tie these expenses to the monthly trial balance or the audited financial statement, the daily production reports were the only alternative internal accounting records NPB could use to substantiate those expenses.

The Department did attempt to make a more appropriate allocation for labor and overhead costs, but found that by doing so, it would have to ignore verified subcontracting costs. NPB's computer submission recorded its subcontracting, in-house labor, and overhead expenses under the same computer variable. In order to use reallocated in-house labor, and overhead costs in our analysis, we would have had to segregate the verified subcontracting expense from the total subcontracting, labor and overhead cost reported under this computer variable. The only data available to the Department for segregating the subcontracting expense from the other two items are worksheets of voluminous data which were provided by the company at verification. Since this information was not on computer tape, we could not incorporate it into NPB's computer database. Thus, if the Department were to accept a new allocation for NPB's labor and overhead, it would also have to derive a new allocation for its subcontracting costs. We consider it inappropriate to accept reallocated data, for purposes of analysis, if applying that revised data would result in rejection of verified information.

The alternate allocation methodology for labor and overhead costs proposed by NPB in its prehearing brief (aggregate labor and overhead expenses allocated across aggregate material and subcontracting costs) would result in an under- or over-allocation of these items. The Department learned, at verification,

that production steps performed by subcontractors are not the same for all models; therefore, models with the highest subcontracting cost would be allocated higher portions of the labor and overhead costs.

In cases where the Department has accepted cost allocations based on aggregate data, it has done so because the costs involved bore some relationship to each other, or because such cost allocations were appropriate given the companies, internal cost accounting systems. For example, in Atlantic Sugar the company involved did not maintain disaggregated records, and therefore in determining injury the International Trade Commission (ITC) devised appropriate aggregate allocations. Here, some disaggregated records were kept by NPB, and unlike the ITC decision in Atlantic Sugar, the Department was unable to devise an appropriate allocation methodology.

Finally, we note that NPB's failure to substantiate its claimed labor and overhead costs was not a function of the shortened verification. Rather, this failure resulted from the complex and inappropriate allocation methodology used by the respondent to derive model-specific labor and overhead costs.

For the reasons discussed above, the Department was not able to conduct a test for sales below the cost of production. Thus, we were unable to use home market sales for comparison purposes. For the same reasons that NPB's data were unacceptable for the cost test, they were unacceptable for use in constructed value. Therefore, for this firm, we used as BIA the higher of the "all others" rate from the LTFV investigation or the highest weighted-average rate calculated for any individual firm in the instant review.

Comment 6: NPB contends that the Department should not reject the SG&A data for two fiscal years that it submitted (September 21, 1987-September 20, 1988 and September 21, 1988-September 20, 1989), simply because the first fiscal year does not coincide with the period of review. NPB notes that

section A of the Department's questionnaire instructed respondents to "Provide English translations of your audited consolidated financial statements for your two most recent fiscal years." At verification NPB provided the Department with the most recent audited fiscal year (September 21, 1989-September 20, 1990), thus the Department should use the SG&A as reported, or alternatively, for its reallocation, should use data from the two fiscal periods which coincide with the period of review. Moreover, NPB contends that the Department has known since submission of the section A response that NPB submitted data covering a fiscal period outside the period of review, yet the Department failed to note this or request updated information in its deficiency letter. In the instant review the Department had also not issued a deficiency letter to Osaka Pump for certain missing information, and was requesting the information after publication of the preliminary results of review. The Department must apply the same standard to NPB, especially since those missing data were already provided and verified.

Department's Position: We did not reject NPB's fiscal year SG&A data simply because they had not been provided in the company's response to our questionnaire. For a complete discussion of our use of BIA for NPB see the *Department's Position* to *Comment 5* above.

Comment 7: ZF argues that the Department should not use BIA for its ESP sales but instead should use the data ZF submitted. If the Department must use BIA, however, the most adverse BIA should not be used because any information not provided by ZF is simply information ZF does not have. Moreover, the Department's practice is to apply the most adverse BIA when a respondent refuses to cooperate, whereas ZF cooperated fully with the Department.

Department's Position: ZF's response to our questionnaire was neither timely nor adequate. Its response to section A, which was due on June 28, 1990, was not submitted until July 19, and contained serious deficiencies which prevented the Department

from making a proper analysis. The Department requested that ZF revise its section A response and resubmit it along with its responses to sections B and C on September 7, 1990. The Department did not receive them until September 11, 1990. Furthermore, the responses to all three sections were substantially deficient. Most notably, the submissions did not include ZF's ESP sales data, and the PP sales data were incomplete. ZF subsequently requested that it be permitted to submit a price list response, and the Department accepted this approach for ZF's purchase price sales. This information was submitted on October 15, 1990. A price list submitted for this purpose did not include prices for the subject merchandise. Ultimately, a proper price list was submitted, which enabled the Department to perform a proper analysis of ZF's PP sales. Nevertheless, no additional information was submitted to the Department for ZF's ESP sales. On February 7, 1991, ZF indicated to the Department that, because the majority of its ESP sales were actually made through service contracts involving the repair of transmissions, and the bearings themselves accounted for an insignificant portion of the value of those contracts, such bearings should be considered outside the scope of the order. We requested that ZF provide documentation that would support this claim; however, ZF did not provide the evidence we requested (*see* the section on "Roller Chain" in this appendix).

The Department maintained that ZF, in order to account for its ESP sales, should attempt to make reasonable allocations of its ESP expenses using records it did keep. ZF continued to make its argument concerning further processing, but provided no supporting evidence for its claim. Finally, on April 17, 1991, ZF did attempt to make the allocations requested by the Department, but this was not done until after publication of the preliminary results. Lacking a substantive response from ZF concerning its ESP sales, we used the first tier of BIA to calculate the margin on its ESP sales.

Comment 8: Asahi and McGill argue that the Department's use of the most adverse BIA for Asahi's sales is not

justified. If Asahi's information is not used, the Department should use as BIA the highest non-BIA rate from this review or Asahi's rate from the original investigation.

Asahi contends that its conduct throughout this review demonstrates its full cooperation with the Department. The errors in its data were inadvertent and reported as soon as discovered. Asahi further maintains that the Department's practice has been to use either a BIA rate only for that portion of the response that was inadequate or to disregard the entire response and use either the firm's rate from the previous review or the highest rate calculated for a responding firm in the current review. A BIA rate drawn from unsubstantiated estimates in the petition is unduly punitive and contrary to Department policy.

Federal-Mogul argues that the Department is compelled to use BIA for Asahi, because verification revealed that there were severe deficiencies in Asahi's reported sales.

Department's Position: The U.S. sales listing in Asahi's response omitted a substantial portion of its U.S. sales and thus was inadequate. We agree, however, that Asahi did make a reasonable attempt to comply with the Department's requirements for the review and that the omission was inadvertent. Asahi provided a narrative response to all pertinent sections of our questionnaire and provided a computer tape containing its sales listings, though these sales listings were flawed. Furthermore, Asahi's response was sufficiently adequate on its face to warrant verification. Accordingly, for these final results we used as BIA the higher of the rate applicable to Asahi from the original investigation or the highest rate calculated for any individual firm in the relevant instant review.

* * * *

(Text Deleted)

* * * *

APPENDIX J

TARIFF ACT OF 1930 19 USCS § 1677e

§ 1677e. Verification of information

(a) Certification of submissions. Any person providing factual information to the administering authority or the Commission in connection with a proceeding under this title on behalf of the petitioner or any other interested party shall certify that such information is accurate and complete to the best of that person's knowledge.

(b) Verification. The administering authority shall verify all information relied upon in making—

(1) a final determination in an investigation,

(2) a revocation under section 751(c) [19 USCS § 1675(c)], and

(3) a review and determination under section 751(a) [19 USCS § 1675(a)], if—

(A) verification is timely requested by an interested party as defined in section 771(9)(C), (D), (E), (F), or (G) [19 USCS § 1677(9)(C), (D), (E), (F), or (G)], and

(B) no verification was made under this paragraph during the 2 immediately preceding reviews and determinations under that section of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown.

In publishing notice of any action referred to in paragraph (1), (2), or (3), the administering authority shall report the methods and procedures used to verify such information. If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action, which may include, in actions referred to in paragraph (1), the information submitted in support of the petition.

(c) **Determinations to be made on best information available.** In making their determinations under this title, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

APPENDIX K

International Trade Administration,
Commerce 19 C.F.R. § 353.37

§ 353.37 Best information available.

(a) Use of best information available. The Secretary will use the best information available whenever the Secretary:

(1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or

(2) is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

(b) *What is best information available.* The best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties, as defined in paragraph (k)(3), (k)(4), (k)(5), or (k)(6) of § 353.2. If an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available.

APPENDIX L

Circuit Court Decisions

First Circuit

Shaw's Supermarkets, Inc. v. National Labor Relations Bd., 884 F.2d 34 (1st Cir. 1989)

National Labor Relations Bd. v. West Sand and Gravel Co., 612 F.2d 1326 (1st Cir. 1979)

Third Circuit

Mazza v. Secretary of Dep't of Health and Human Servs., 903 F.2d 953 (3d Cir. 1990)

Fifth Circuit

Emery Worldwide, a C.F. Co. v. National Labor Relations Bd., 966 F.2d 1003 (5th Cir. 1992)

Port Terminal R.R. Ass'n v. United States, 551 F.2d 1336 (5th Cir. 1977)

Seventh Circuit

International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. National Labor Relations Bd., 802 F.2d 969 (7th Cir. 1986)

Continental Web Press, Inc. v. National Labor Relations Bd., 742 F.2d 1087 (7th Cir. 1984)

Aero Mayflower Transit Co. v. Interstate Commerce Comm'n, 699 F.2d 938 (7th Cir. 1983)

Niedert Motor Serv., Inc. v. United States, 583 F.2d 954 (7th Cir. 1978)

Ninth Circuit

Arizona Elec. Power Coop., Inc. v. United States, 816 F.2d 1366 (9th Cir. 1987)

D.C. Circuit

Flagstaff Broadcasting Found. v. Federal Communications Comm'n, 979 F.2d 1566 (D.C. Cir. 1992)

Teamsters Local Union Nos. 822 and 592 v. National Labor Relations Bd., 956 F.2d 317 (D.C. Cir. 1992)

Cross-Sound Ferry Servs., Inc. v. Interstate Commerce Comm'n, 873 F.2d 395 (D.C. Cir. 1989)

Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm'n, 867 F.2d 688 (D.C. Cir. 1989)

Southwestern Elec. Power Co. v. Federal Energy Regulatory Comm'n, 810 F.2d 289 (D.C. Cir. 1987)

National Black Media Coalition v. Federal Communications Comm'n, 775 F.2d 342 (D.C. Cir. 1985)

Wilkett v. Interstate Commerce Comm'n, 710 F.2d 861 (D.C. Cir. 1983)

Greyhound Corp. v. Interstate Commerce Comm'n, 668 F.2d 1354 (D.C. Cir. 1981)

Standard Rate and Data Serv., Inc. v. United States Postal Serv., 584 F.2d 473 (D.C. Cir. 1978)

Aluminum Company of Am. v. Interstate Commerce Comm'n, 581 F.2d 1004 (D.C. Cir.), cert. denied, 439 U.S. 980 (1978)

Local 777, Democratic Union Organizing Comm., Seafarers Int'l Union of N. Am., AFL-CIO v. National Labor Relations Bd., 603 F.2d 862 (D.C. Cir. 1978)

APPENDIX M

Copyright 1992 American Lawyer Newspapers Group, Inc.

Texas Lawyer

May 11, 1992

SECTION: COMMENTARY; Pg. 20

LENGTH: 1542 words

HEADLINE: ANTIDUMPING LAWS: WINNING BY MANIPULATION

BYLINE: FEDERAL LEGISLATION by James Bovard; James Bovard is the author of "The Fair Trade Fraud," published in October 1991 by St. Martin's Press. Distributed by the American Lawyer News Services

HIGHLIGHT: The Commerce Department helps domestic companies and hurts consumers by defining the sale of many low-priced imports as illegal dumping -- when honest competition is more like it.

BODY: Economic xenophobia is the foundation of U.S. anti-dumping law. The Commerce Department sees low-priced imported goods as Trojan horses insidiously trying to undermine the American economy. The U.S. government has imposed more dumping penalties against low-priced imports than has any other government in the world.

Dumping supposedly means that a foreign company is selling a product in the United States for less than in its home market or for less than its cost of production. But, in the past 18 years, Congress and federal bureaucrats have repeatedly expanded the definition of dumping so that almost all investigations lead to a finding of guilt. Between 1980 and 1989, the Commerce

Department found only 5 percent of all imports it investigated not guilty of violating dumping laws.

The Commerce Department, which prides itself on being an "advocate for U.S. business," is able to arrive at this astoundingly high percentage of guilt through a number of twists and turns. Commerce sometimes creates "dumping" by comparing prices of low-quality products sold in the United States and high-quality products abroad. For example, in the 1986-87 investigations of flowers from Colombia, the Netherlands, Kenya, Chile and Ecuador, Commerce effectively compared the price of a fresh flower sold in Amsterdam with the price of a wilted flower sold in New York. Commerce acknowledged in the Federal Register that flowers' "perishability" meant that "sellers may be faced with the choice of accepting whatever return they can obtain on certain sales or destroying the merchandise." Despite this concession, Commerce still penalized foreign flower sellers.

In another case, Commerce included the price ($ 0.00) of unsold Japanese television sets donated to charity in the U.S. market in performing calculations to determine whether the company had been dumping.

Other examples: The sale price of new forklifts in Japan is contrasted with the price of three-year-old forklifts sold in the United States; sales of sample Japanese tapered roller bearings in the United States are measured against regular bearing sales in Japan; the price of small New Zealand kiwis sold in the United States is gauged against the price of larger kiwis sold in Japan.

THE PRICE IS WRONG

In addition to equating different products unfairly. Commerce also routinely convicts foreign companies for differences between their U.S. wholesale and foreign retail prices. In the case of Swedish stainless steel, Commerce compared prices of homemarket sales of quantities of less than 500 kilograms with U.S. sales of quantities of more than 5,000 kilograms. That the

Swedish company sold 5,000 kilogram quantities for lower prices than 500 kilogram quantities proved that it was dumping.

The Commerce Department doesn't just compare the price of products sold in the United States with those sold in the home market. When foreign producers have limited sales at home. Commerce may compare a company's export prices to the United States with its export prices to a third market. A Korean company, Chungi, was penalized in 1990 for selling sweaters to Americans for 1.2 percent less than it sold sweaters to Mexicans. Young Woo, another Korean sweater manufacturer, was convicted because its U.S. prices were 0.73 percent less than its prices to the United Kingdom. According to the Commerce Department, foreign companies are acting unfairly unless they charge Americans the highest prices in the world.

The U.S. also includes a cost-of-production test that requires foreign corporations to earn an 8-percent profit on their U.S. exports -- a totally arbitrary number. According to the U.S. International Trade Commission, average "profits before income taxes for all U.S. corporations in 1986 were 6 percent of sales." Thirteen of the 15 largest companies in the Fortune 500 failed the 8 percent profit test in 1989. Yet that didn't stop Commerce from hitting a Hong Kong sweater exporter with a 5.86 percent dumping duty in 1990 because U.S. government investigators claimed that the company was making a profit of only 2.14 percent.

Just the existence of a dumping investigation can impose crushing burdens on foreign companies. Commerce effectively wrecked the exports of hundreds of Taiwanese sweater companies because a few small Taiwanese companies could not respond quickly enough in English to Commerce's 100-page, single-space questionnaire. Commerce ignored the pleas of one Taiwanese sweater company whose management consisted of the owner and his wife, declaring that "lack of manpower" to answer the questionnaire was no excuse.

It exhibited no more sympathy for another Taiwanese company that had trouble responding to Commerce's request largely because it had lost many of its records in a factory fire. Commerce imposed punitive duties on both companies, even though it conceded in its Federal Register notice that "none of the investigated [Taiwanese] companies refused to provide the information requested, refused verification, or otherwise significantly impeded the Department's investigation."

As a result of such judgments and other similar ones, Commerce arrived at an average penalty duty of 21.94 percent for Taiwanese sweaters. Because the U.S. also imposes a 34 percent tariff on the sweaters, this effectively locks hundreds of Taiwanese sweater companies out of the U.S. market.

JUDGE, JURY AND EXECUTIONER

The Commerce Department is able to get away with imposing such vast burdens and daunting deadlines because, as David Palmeter of the Washington, D.C., office of Mudge Rose Guthrie Alexander & Ferdon observes, it is judge, jury and executioner in dumping cases.

In 1989, Commerce Secretary Robert Mosbacher, the department's highest "judge" in dumping cases, described himself as "the advocate for U.S. business in the [Bush] administration." Given that the judge has proudly declared his bias in favor of U.S. businesses, it is not surprising that dumping investigations are often a kangaroo court.

Commerce is able to disregard its own obligation to be consistent in its rulings. Commerce claims it can change the methodology by which it judges the fairness of foreign prices at any time -- even retroactively. "Neither the law nor the Commerce Regulations compel us to use precisely the same method of determining foreign market value as that used in the original investigation or a previous administrative review," Commerce observed in a 1987 Federal Register notice.

Nor is it important for Commerce to make too many explicit rules, because then the department might be obligated to follow them, unduly restricting "the ability of the department to carry out the intent of Congress." In other words, Commerce needs to be able to change the rules of the game at any time to assure that the right side wins.

THE REAL AGENDA

Commerce officials haven't been shy about revealing their real agenda in dumping cases: to punish American companies that import foreign products. Federal officials have bragged about the chilling effect of the dumping law. "If you are a purchaser, you have to think very long and hard before buying from an exporter given that undetermined liability that you are going to face for quite a number of years," warned Commerce Deputy Assistant Secretary Gilbert Kaplan in testimony before the Senate Finance Committee in 1986. Commerce Secretary Malcolm Baldrige declared in 1986: "The [dumping] penalty is actually applied to the U.S. importer, but it means that if he's got to pay that penalty, he just ain't going to import any more."

Commerce's unjust application of the dumping law reveals the economic absurdity underlying their basic premise -- that it should be a crime for a company to sell the same product for two different prices in two different markets 15,000 miles apart. Price differentials usually prove nothing except that prices are different. If a businessman sold refrigerators to Eskimos and to people on a tropical island -- and the people on the tropical island willingly paid more -- does that mean the businessman is unfairly dumping the refrigerators on the Eskimos? Are the Eskimos harmed by the price differential between the arctic and the tropics'

Dumping law presumes that the U.S. economy is so sensitive that minuscule differences between U.S. and foreign prices can cause an economic earthquake that will level competing American industries. But that isn't necessarily so. As economist Gottfried Haberler noted in 1936, "The effects upon the importing

country of imports which are cheap because they are dumped are in no way different from those of imports which are cheap for some other reason." The fact that prices on different continents are different usually has no impact on anything except the imagination of politicians and bureaucrats.

As the U.S. government admitted in a 1988 court brief, the dumping law exists to aid U.S. companies. The dumping law was created to prevent foreigners from treating Americans unfairly; it has instead become a license for U.S. officials to act unfairly toward foreigners. It should not be a federal crime to charge low prices to American consumers.

GRAPHIC: Picture, no caption

Copyright 1992 The Heritage Foundation

Heritage Foundation Reports

July 21, 1992

SECTION: BACKGROUNDER; The Center For International Economic Growth; No. 906

LENGTH: 8216 words

HEADLINE: A GUIDE TO ANTIDUMPING LAWS: AMERICA'S UNFAIR TRADE PRACTICE

SERIES: This study is part of series focusing on the problems of government regulation of the economy, and on policies to improve American competitiveness. Earlier studies on these topics have included: William G. Laffer III, "George Bush's Hidden Tax: the Explosion in Regulation," Backgrounder No. 905, July 10, 1992; Bryan T. Johnson, "Forging Alliances To Bust Into the Japanese Market," Backgrounder No. 876, January 31, 1992; Bryan T. Johnson, "Why Bush Failed In Japan," Executive Memorandum No. 317, January 13, 1992; Bryan T. Johnson, "Making America More Competitive With Foreign Investment," Backgrounder No. 864, November 6, 1991; Bryan T. Johnson, "Increasing Competitiveness Through Strategic Alliances," Backgrounder No. 857, September 26, 1991. Future studies will focus on other aspects of America's trade policy, the regulatory process, and relate horror stories of regulatory abuse.

BYLINE: Bryan T. Johnson, Policy Analyst

BODY:

INTRODUCTION

Many American policy makers over the past decade have replaced calls for more free trade with demands for "fair trade." The United States, they say, should keep its market opened to imports, but most also act aggressively against "unfair" trade practices by foreign businesses and governments. One of the pillars of this "fair trade" approach is a set of so-called antidumping and countervailing duty laws.[n1] Antidumping laws seek to prevent products manufactured overseas from being sold by foreign firms in the U.S. at "less than fair value." Countervailing duties seek to offset the subsidies that foreign governments provide for some exporting firms by imposing duties on the goods these firms export to the U.S.

While duties and restrictions designed to achieve so-called fair trade seem reasonable to many Americans, in reality their effect is anything but fair or beneficial to U.S. consumers. The antidumping laws are confusing and arbitrary, and in many instances merely allow American firms to secure punitive tariffs against competing importers where no unfair trade practices are involved. Worse, these laws drive up the costs of imported components used by other American enterprises, making their products less competitive in world markets. As a result, American consumers pay higher prices for both imported and domestically produced goods, and American workers find fewer employment opportunities in less competitive American firms.

When an American firm accuses a foreign firm of dumping in the U.S. market, the Commerce Department must compare the price of the good in the home market of the foreign

---

[n1] Both antidumping laws and countervailing duty laws shall hereinafter be referred to simply as antidumping laws, unless otherwise noted.

firm and the price it is sold for in the U.S. If the U.S. price does not reflect "fair market value," as determined by the Commerce Department, the foreign firm can be found guilty of dumping.

Complex and Arcane Methods. The problem is that the methods the Commerce Department employs are complex, arcane, and plagued with conceptual and technical problems. And because so many aspects of estimating the fair market value are subjective, it is easy for the Commerce Department to "prove" dumping when in fact no dumping has occurred. This can happen for a number of reasons:

* When no government subsidy is involved, the definition of an "unfair" price is arbitrary.

* The Commerce Department often will compare the prices of different rather than the identical products, so price comparisons are subjective.

* The Commerce Department often will subtract expenses from foreign products sold in the U.S. in making its calculation, but not subtract the same expenses incurred in the home market.

* The Commerce Department often neglects to take into account exchange rate fluctuations in its comparative price calculations for the home and export markets.

* When determining prices in the foreign market, the Commerce Department sometimes will use an "average foreign price" for a product, which does not take into account price fluctuations at the time of the sale. Moreover, Commerce often will neglect to take into account the differences in wholesale and retail prices.

* In many cases, the Commerce Department requires accused foreign firms to supply a massive amount of information, including business secrets, to determine foreign production costs. If the information supplied is not satisfactory to Department

investigators, they may use production cost estimates by different firms in third countries, even though these costs are not comparable to production costs in the home market.

These practices by the Commerce Department routinely result in inaccurate production cost determinations, causing many companies to be found guilty of dumping, even when no such action occurred. In some cases, these questionable practices are simply the product of overzealous officials. But for the most part, these problems are systemic, rooted in the dumping laws themselves.

To promote free trade and thus to give consumers full access to the products they want, the Bush Administration should seek the support of Commerce Department to end harmful dumping determinations that artificially raise the prices of certain imports. Specifically, it should:

* Seek agreement in the current Uruguay round of General Agreement on Tariff and Trade (GATT) talks for a multilateral phase-out of antidumping laws in exchange for stricter limits on government subsidies to industries.

* Commission a study of the damage done to American business and consumers by antidumping laws.

* Propose interim legislation that incorporates the initial intent of the Antidumping Act of 1916.

Antidumping laws originally sought to prevent foreign exporters from using predatory pricing to undermine American businesses. The burden of proof was on the government and American businesses. But these laws have evolved into yet another form of trade protection, which American firms can use to keep out competitors, whether or not they are engaged in unfair trade practices. If the U.S. is to be the leading advocate of free trade in the world, and keep its own market open as well, it should eliminate its unfair trade practices.

THE EVOLUTION OF DUMPING LAWS IN THE U.S.

According to the U.S. Department of Commerce definition, "dumping" occurs when, ". . . a good is sold for less than its 'fair value,' generally meaning it is exported for less than it is sold in the domestic market or third country markets or it is sold for less than production cost."[n2] Since 1897, the U.S. effectively has had antidumping laws on the books, and these laws have enabled the U.S. government to punish firms in other countries that send subsidized exports to the U.S.[n3]

It was not until 1916, however, that Congress passed a law specifically targeting dumping. According to the Antidumping Act of that year, for dumping to occur, a "predatory intent" by the exporter must be shown.[n4] In other words, the exporter must intend to sell its products in the U.S. at below production costs in order to cause material injury to an existing U.S. company.[n5] This law came in an era in which the federal government also enacted antitrust laws to prevent American enterprises from pursuing similar predatory practices against their domestic competitors.

With the Antidumping Act of 1921, Congress loosened the requirements to permit federal action to keep out foreign products not only if foreign companies engaged in predatory pricing, but merely if their products were deemed to be priced lower than similar American products, regardless of whether predatory

---

[n2] Reference Terms of International Trade, United States Department of Commerce, International Trade Administration, Washington, D.C., July 1987, p. 4.

[n3] Countervailing Duty Law of 1897, 19 U.S.C. 1303.

[n4] Antidumping Act of 1916, 15 U.S.C. 71.

[n5] This act is codified in Section 801 of the Revenue Act of 1916.

pricing was an issue.[86] This Act forms the basis for America's current antidumping law. The Antidumping Act was incorporated into the 1930 Tariff Act, and later amended by the 1979 Trade Act, the 1984 Trade Act, and the 1988 Trade Act.[87] These revisions made it easier for American companies to initiate dumping complaints, and for the U.S. government to restrict foreign imports that are sold at lower prices than similar American products.

Several multilateral agreements also have addressed the dumping issue. The Kennedy Round of the General Agreement on Tariffs and Trade (GATT), held between 1963 and 1967, resulted in the GATT Antidumping Code. This code sets out guidelines under which countries may act against foreign firms that practice predatory pricing resulting in material injury to an industry based in the importing country.[88] GATT itself does not establish specific definitions of what constitutes dumping or act against countries that dump; it simply creates guidelines on which countries can adopt their own laws to prevent dumping. The code was amended during the Tokyo Round of GATT, held between 1973 to 1979.[89] Of the 103 members of GATT, however, only

---

[86] "Comparison of U.S. and Foreign Antidumping Practices," United States General Accounting Office, Report No. GAO/NSIAd-91-59, November 1990, p. 8.

[87] "1992 Trade Policy Agenda and 1991 Annual Report of the President of the United States on the Trade Agreements Program," Office of the United States Trade Representative, Executive Office of the President, Washington, D.C., 1991, p. 78.

[88] "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," June 30, 1967, GATT BISD, 15th Supp., 1968, p. 24.

[89] "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," April 12, 1979, GATT, BISD 26th Supp., 1979, p. 171.

25 have signed on to this amended code.[n10] The Tokyo Round agreement mandates that all antidumping investigations be reported immediately to GATT and that a semiannual report on antidumping cases be forwarded by the signature countries to the GATT Secretariat.[n11] According to the Code, each signatory can legislate and administer its antidumping code, as long as it conforms to GATT standards.[n12] As recently as this year, the GATT has found the U.S. violating the intent of international guidelines to which the laws of signatory countries must conform. Specifically, the GATT accused the U.S. of making it too easy for American enterprises to obtain punitive tariffs against foreign products. The U.S. so far has ignored the GATT warning, indicating to other countries that the U.S. does not intend to play fair in trade.[n13]

The Growth in Cases. Recently the number of dumping cases instigated by American businesses using U.S. laws has grown. Many U.S. industries that in the past might have sought trade protection directly from Congress have found this route more

---

[n10] These are: Australia, Austria, Brazil, Canada, Czechoslovakia, the European Community, Egypt, Finland, Hong Kong, Hungary, India, Japan, South Korea, Mexico, New Zealand, Norway, Pakistan, Poland, Romania, Singapore, Spain, Sweden, Switzerland, the United States, and Yugoslavia. The European Community is considered one member, with the exception of Spain, which signed the GATT antidumping code separately.

[n11] "Use of the GATT Antidumping Code," General Accounting Office, Washington D.C., GAO/NSIAD-90-238FS, July 1990, p. 2.

[n12] These standards are explained in Article VI of the GATT Agreement.

[n13] "GATT: U.S. Bars Cheaper Imports," The Washington Times, March 13, 1992, p. C3.

difficult as successive GATT rounds have eliminated many forms of direct trade protectionism. U.S. antidumping laws thus have proved to be a more convenient tool to limit competition by denying foreigners access to the U.S. market. The U.S. steel industry, for example, has received trade protection for almost two decades. In 1992, however, the quota system that had protected the U.S. industry expired. As a result, the industry has flooded the Department of Commerce and the International Trade Commission with new dumping complaints.

During the 1980s, 1,456 antidumping cases were reported to the GATT. Australia, the United States, Canada, and the European Community accounted for 95 percent of those cases. The U.S. was responsible for 90 percent of all countervailing duty cases initiated between 1980 and 1986.[n14] In 1980, there were only 83 outstanding U.S. antidumping orders on foreign imports. By 1990, outstanding antidumping orders had increased to 197. In that year, the U.S. government considered 27 dumping complaints, and almost 200 separate dumping orders were, in effect, imposing duties and higher prices on one or more products from 42 different countries. This was up from 84 orders on 23 countries in 1980.[n15] And in the first ten months of 1991, the number of new dumping complaints considered by the U.S. was more than double the 1990 figure.[n16]

[n14] Jeffrey J. Schott, "The Global Trade Negotiations: What Can Be Achieved?" Policy Analysis in International Economics #29 (Washington, D.C.: Institute for International Economics, September 1990), p. 17.

[n15] From an unpublished forthcoming study by Keith Anderson, Senior Advisor to the Vice Chairman Anne Brunsdale, International Trade Commission, Washington, D.C.

[n16] "GATT: U.S. Bars Cheaper Imports," The Washington Times, March 13, 1992, p. C3.

HOW THE U.S. GOVERNMENT DETERMINES "DUMPING"

The Investigation Process. The U.S. Department of Commerce and the U.S. International Trade Commission (ITC) jointly administer America's cumbersome antidumping law. The steps in a dumping case are as follows:

1) A U.S. company submits a petition to the International Trade Administration at the Department of Commerce, alleging that a foreign company is dumping its product in the U.S.

2) If the Commerce Department determines that sufficient evidence exists, it will proceed with an investigation.

3) The ITC then may start its own investigation to determine whether there is injury to any domestic companies.

4) If the ITC finds there has been material injury to a U.S. company, the Commerce Department will determine whether the product in question is being sold in the U.S. at "less than fair value," or at a lower price than that sold in the home market or a third country market.

5) If the Department issues a preliminary finding that sufficient evidence of such pricing practices exists, it will direct the U.S. Customs Service to suspend the importation of the product, or require U.S. importers of the product to post a deposit. This bond must be paid to the U.S. government in the event that a final determination finds that the product is being sold at less than fair value.

6) The ITC, at this point, must determine if there is any actual material damage to U.S. companies caused by the alleged dumped imports.

7) If the ITC determines that the dumping has caused injury to a U.S. manufacturer, the products then are subjected to "antidumping duties" equal to the amount of the determined

dumping margin. The dumping margin is the difference between the price of the "dumped product" and the price the product would sell for if it were being sold at a "fair" price, according to calculations by the ITC. If, however, the ITC finds that there is insufficient evidence, the case is dismissed.

Investigation Methods. When the Commerce Department attempts to determine when a product is being dumped, it compares the "U.S. price" with the product's "foreign market value." The U.S. price is determined by the purchase price when the good enters the U.S., minus packaging costs, import duties, and taxes. In other words, the exporter's sale price will be reduced by the amount of fees paid and other pre-sale costs that result from selling products in the U.S. After this amount is determined, the Commerce Department will then determine if the price reflects a "fair market value" (FMV). The FMV can be determined in three ways, namely:

1) Home Market Price.[n17] The Commerce Department tries to determine how much the same product is sold for in the country where it is manufactured. If the price in the home market is more than the U.S. purchase price, the Department normally finds that dumping has occurred.

2) Third Country Price.[n18] If there are no home market sales of the product, or the sales are so small that it is impossible to determine a market price, the price that the product sells for in a third country may be used. If that price is higher than in the U.S., the Commerce Department normally would find that dumping has occurred.

[n17] 19 U.S.C. Section 1677b(1)(A).

[n18] 19 U.S.C. Section 1677b(1)(B).

3) Constructed Value.[n19] If the market value of the product cannot be determined either by a home market price or a third country price, the Department will rely on a "constructed value." The constructed value method attempts to establish the exact cost of production of the product in question by using "best available information," which includes financial statements and documents on the product and companies in question. If this method is used, the U.S. government requires the foreign company under investigation to provide financial statements, production cost documents, and any other kind of document necessary to determine the cost of production.

If the company does not provide the information in a specified period of time, the Commerce Department will then look to a third country of similar "level of industrialization" to determine how much "similar" products in that country cost to produce. This might mean that Commerce will ask the U.S. companies that initiated the case to provide information on the accused foreign companies.

When it constructs value, the Commerce Department adds an 8 percent profit margin to its calculated production cost to estimate a "fair" sale price in the U.S. This effectively means that if a foreign company cannot sell its product in the U.S. for at least an 8 percent profit, it likely will be found guilty of dumping. If a foreign company is willing to accept only a 7 percent profit on a shipment of sweaters, for example, the Commerce Department would find it guilty of dumping those sweaters in the U.S.

PROBLEMS WITH U.S. ANTIDUMPING LAWS

While the federal government claims that antidumping laws help fight unfair trade practices by foreign firms or governments, in reality there are so many problems associated

---

[n19] 19 U.S.C. Sections 1677b(a)(2), 1677b(b), and 1677b(e).

with determining the existence of dumping that the rules themselves turn out to be unfair. Among the difficulties:

1) Defining Unfair Prices. When no government subsidies are involved, there is no economic case for the claim that selling at below cost is an unfair practice. The claim of unfairness usually is based on the fear that a business will use so-called predatory pricing to drive out its U.S. competitors, leaving it to enjoy a monopoly and charge U.S. consumers higher prices. But the world market today is so integrated and competitive that it is virtually impossible for a company to exploit a dominant share of a market for long, if at all. Thanks to freer trade in recent decades, there is little chance of an exporter achieving the power to charge a monopoly price.

Another problem with the concept of unfair dumping is that U.S. firms presumably can cut their prices to "unfair" levels in order to drive their foreign competitors out of the American market. In other words, if the U.S. firm is allowed to "dump" in its own market, the practice is not considered unfair.

Finally, it is a common business practice to sell products at a loss. For example, if a product is not selling well, a business owner might sell below cost in order to recoup at least some of his investment in the product. Yet when a foreign firm sells below cost in the U.S. market, it is considered to be abnormal and unfair.

2) The Problem of Comparing Products. When a U.S. company charges a foreign company with dumping, the Commerce Department assumes that the products in question are similar. For example, if U.S. farmers charge Colombian farmers with dumping, it is assumed that the American farmers are accusing the Colombians of dumping the identical crop to that produced by Americans. Yet many U.S. dumping cases against foreign products are initiated by American companies marketing products significantly dissimilar to the products allegedly dumped. In such cases, when the U.S. Commerce Department attempts to determine

a "fair market value" for the item in question, it is comparing apples and oranges.

In one 1984 dumping case, for example, an Italian company was found guilty of dumping pads of woodwind musical instruments in the U.S. Yet the smaller, cheaper, and lower quality woodwind pads sold by the Italian firm were meant for the lower lines of instruments in the U.S. market. The firm sold more expensive, higher quality pads for the top-of-the-line woodwind instruments in the Italian home market. When Commerce initiated its investigation, it compared the prices of the two products as though they were identical.[n20] This was like a foreign country accusing America's General Motors of dumping its cars by comparing the price of an exported Chevette with the price of a luxury Cadillac sold in the U.S. Not surprisingly, the U.S. government found that the Italian company was dumping woodwind pads in the U.S. In defending its actions, Commerce admitted that it did not compare similar products, but then said that it had the prerogative not to do so.

3) Calculating the Costs Associated with Selling. When the Commerce Department attempts to determine the fair market value of a product sold in the U.S., it subtracts various "sales-associated" costs from the price that the import is selling for in the U.S. For example, packaging costs, import duties, and other taxes are removed from the U.S. selling price. Yet when Commerce seeks to determine the home market value price of the same good, many sales-associated costs are not eliminated. This can make the base price of the good in the country of origin appear artificially higher than its base selling price in the U.S.

[n20] James Bovard, The Fair Trade Fraud: How Congress Pillages the Consumer and Decimates American Competitiveness" (New York, St. Martin's Press, 1991), p. 119; also see Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States Court of International Trade, No. 84-10-01435, June 12, 1986, 640 F.Supp. 255 (CIT 1986).

Thus it gives the incorrect perception the foreign good is been dumped.

In 1989, for example, the U.S. initiated a dumping investigation against imported telephone systems. In one step of its investigation, the Commerce Department deducted the cost of inland freight for Korean phone systems sold in the U.S. while neglecting to subtract the same costs for Korean inland freight. The Korean inland freight was higher because, unlike the shipment of telephone systems to the U.S. that went to a large distributor, the systems in Korea went directly to hundreds of different retailers, increasing the cost of distribution. Thus the price of the product sold in Korea appeared higher than it actually was when compared to the U.S. price.

4) Adjusting for Exchange Rates. When the Commerce Department rules that a product is being dumped, it must determine the dumping margin between the price a product is sold for in the foreign market and the presumed U.S. market price. To be compared, both of these prices must be calculated into U.S. dollars. But this creates a problem. Some business agreements between a foreign company and a U.S. importer use fixed exchange rate contracts. So the selling price in the exporter's home currency will fluctuate according to the current exchange rate, yet production costs remain unchanged. When investigating a dumping case, however, the U.S. government sometimes will use the current exchange rate.

This can give a misleading suggestion of dumping, because in the time between the signing of the contract between the foreign and U.S. companies and the time of actual delivery of goods, the exchange rate between the U.S. dollar and the foreign currency might have changed significantly. Deputy Assistant Secretary Gilbert Kaplan, of the Commerce Department, noted this problem in a 1986 Senate Finance Committee hearing. Explained Kaplan, "If the home market price is 200 yen and the U.S. price is $ 1.00 and the exchange rate is 200 yen equal $ 1.00, there is no dumping. If the yen appreciated against the dollar, however, so

that only 150 yen equaled $ 1.00, unless there was a corresponding change in prices, suddenly the company is dumping by 33 percent, because 200 yen is now worth $ 1.33."[n21]

5) Determining the Average Price. When the Commerce Department attempts to determine the price a foreign good is being sold for in its home market, it uses an "average price level," usually calculated over a six-month period. Yet the Department compares this average foreign price with the U.S. price at a specific time, not an average. This can create serious distortions in price comparisons. For example, a product might sell in the U.S. for $ 100 on a particular date when competition is particularly fierce. But the price of that product in the home market might range from $ 90 to $ 150 over a six-month period, for an average of $ 120. In this situation, the company could be found to be dumping. But the average price in the U.S. over the same six-month period also might be $ 120, meaning that dumping, as defined by current laws, in fact did not occur.

Another common defect in the Commerce Department price determination is its practice of comparing retail with wholesale prices. A company may export a product to the United States at a large wholesale discount. This is how many American retailers are able to import large quantities of items at cheaper prices than they could obtain from domestic sources that do not sell in similar bulk quantities. Yet the Commerce Department might compare the U.S. wholesale price with the retail foreign price. In a 1985 case involving cellular telephones Commerce compared the price of Toshiba's phones sold to large U.S. wholesale distributors with the price of the same units sold in Japan directly to retailers. Commerce did not adjust for the price difference that resulted from selling in the larger and smaller

---

[n21] United States Congress, State Committee on Finance, "Remedies Against Dumping of Imports," July 18, 1986 (Washington, D.C.: U.S. Government Printing Office, 1986), p. 35.

quantities. As a result, the foreign price appears higher than the U.S. price, allowing a finding of dumping.[n22]

6) Determining Product Costs. The Commerce Department uses several methods to determine the costs of production of a foreign firm. One method is to require the accused firm to turn over to the U.S. government certain crucial business documents, including trade secrets. A foreign company being investigated by Commerce generally will receive a 50-to-100-page, single-spaced request for information and be allowed only six to eight weeks to comply with the request. During that time, the company must:

- translate the request in their language for distribution to relevant company employees;

- identify sales in U.S. and home market;

- identify all expenses related to the production and export of the product;

- assign each expense to a specific purpose;

- conduct its own investigation on home market and U.S. prices.[n23]

Companies competing internationally understandably are not always willing to divulge to the U.S. government their business secrets and other information that could help their U.S. competitors. But even if they are willing to comply, often it is costly, difficult, or impossible for foreign firms to gather such massive amounts of information in the time required. If the Commerce Department does not receive the information in time,

---

[n22] Bovard, op. cit., p. 122.

[n23] Ibid, p. 135.

it uses alternative methods to calculate production costs. One is to compare production costs of other manufacturers in a third country with a "similar" level of industrialization. This happened in 1986, when a Chinese cookware company accused of dumping its products in the U.S. was unable to comply with Commerce's request for information. In order to determine production costs Commerce compared the company with cookware manufactures in Thailand. The two countries, however, are hardly on the same level of development. Using purchasing power parity, which takes into account inflation, exchange rates, and other cost of living adjustments, per capita gross domestic product in Thailand is about $ 3,600, while in China it is $ 2,600, a $ 1,000 difference.[n24] Even so, the Commerce Department was unable to persuade Thai companies to reveal detailed business information of their companies. So it then used the prosperous countries of France, Norway, and West Germany for comparing production costs with China. Not surprisingly Commerce came up with rather large dumping margins.

To avoid further dumping charges, some foreign companies found guilty of dumping will raise prices on their products to exceed the acceptable margins determined by the Commerce Department. Yet in some cases, Commerce will change the country previously used for comparison, and again find the foreign company guilty of dumping.

This happened in 1990, when the Commerce Department imposed more duties on manhole covers from China. In 1986 China had been found to be dumping manhole covers in the U.S., based on comparisons of costs of producing those items in Belgium, Canada, France, and Japan. In 1990 the case was reviewed again. This time, the Commerce Department decided to use the Philippine manhole cover industry as its basis for comparison even though the Philippine industry did not use pig

---

[n24] "Human Development Report 1992," United Nations, New York, 1992, pp. 127-128.

iron, a primary ingredient in the Chinese product. Thus the products were not similar. But by changing the basis of comparison, a higher dumping margin could be used against the Chinese.[n25]

Even when a foreign company goes to extraordinary lengths to supply information and cooperate fully with the investigation, the Commerce Department still may say that it is insufficient. In a 1989 case, for instance, SKF of Sweden, a manufacturer of ball bearings, was accused of dumping antifriction bearings into the U.S. market. SKF provided the Department with 150,000 pages of data. Still not satisfied, the Commerce Department gave SKF only one week to make revisions of several clerical mistakes. Then the Department declared several figures in this new material supplied by an SKF subsidiary to be misleading, so it dismissed as erroneous almost all of the material SKF had supplied. Eventually, SKF delivered over twelve tons of information to the U.S. government. But because of the errors the Commerce Department treated SKF as if it had turned over no information at all and imposed a dumping margin of 180 percent on the company's products.[n26]

RECENT DUMPING CASES

With the increase of American dumping investigations in recent years, there have been a number of particularly disturbing cases that have been plagued by questionable procedures and that in some instances have hurt U.S. businesses and consumers. Several of these recent dumping cases underscore the problems with America's dumping laws.

[n25] Bovard, op. cit., p. 135-135.

[n26] United States International Trade Commission, investigation numbers 303-TA-19, 303-TA-20, and 731-TA-391-399.

Example: Flat Panel Display (FPD) Screens. In response to a Commerce Department ruling that flat panel display screens, which are used in laptop computers and related products, were being dumped in the U.S. by Japanese companies, the ITC initiated an investigation in February 1991. The ITC in August 1991 found that there was material damage to American producers and thus recommended a 62.7 percent dumping duty on imported screens. This left the American computer industry unable to acquire affordable flat panel displays for their laptop computer production. The problem with this finding: American manufacturers do not even sell certain types of these screens in the U.S. market.

The investigation focused on two basic types of displays -- electroluminescent FPDs and active matrix FPDs. Electroluminescent displays generally are monochrome with lower resolution. Active matrix displays generally are color with higher resolutions. The U.S. has a large electroluminescent display industry and the Japanese share of the U.S. market, at the time of the investigation in 1990, was just 5 percent and shrinking. During the time of the investigation, the small Japanese portion of the U.S. electroluminescent market remained somewhat steady. But it was clear that the Japanese share of the American market in electroluminescent screens was not a threat to the U.S. domestic industry. Still the Commerce Department saw a dumping problem and levied a 7 percent dumping margin.

More significantly, the Commerce Department imposed a 62.7 percent dumping margin for active matrix displays. Yet there is no commercial U.S. active matrix display industry. There are two U.S. companies manufacturing these screens, OIS Optical Imaging Systems, Inc., and Standish Corporation. But their production lines are small and costly, and the firms for the most part supply these screens only to the U.S. government for military uses. In essence, what the Commerce Department and the ITC did was to say that the U.S. active matrix display industry, made up of two small firms supplying the government, was being materially injured by Japanese firms exporting these displays to

large U.S. computer manufacturers who needed them for their laptop computers.

Acting ITC Chairman Anne Brunsdale, who dissented from the opinion, states in the ITC report that, "Apple testified that it considered OIS at the initial stage of its three-part vendor evaluation when deciding which FPD to use in its Macintosh portable. It found that OIS had 'zero high volume manufacturing capability, little customer support experience, zero manufacturing flexibility, zero mass production experience and delivery schedule.' It eliminated OIS at the first stage of consideration."[n27] Thus, American computer manufacturers had determined that there was no domestic source for the needed display screens. Therefore they bought their screens from the only available source, the Japanese. Not sharing Brunsdale's view, the majority of the ITC claimed there was dumping. But because of the high duties imposed by the federal government on these high-quality color displays, America's largest computer manufacturers, Apple, Compaq, and IBM, were left with no access to affordable components for their laptop manufacturing, prompting U.S. computer manufacturers to move production facilities overseas or drop out of the market altogether.

Because the decision to impose duties on these display screens forced many American computer manufacturers to pay higher prices for imports, the U.S. government action also resulted in the loss of American jobs. Shortly after the decision to impose duties on active matrix displays, for example, Toshiba Corporation, which had a production facility in Irvine, California, announced that it would shut down the planet and move production back to Japan. The dumping duty only applied to the screens, which Toshiba imported from its Japan production facilities to

---

[n27] "Certain High-Information Content Flat Panel Displays and Display Glass Therefor [sic] from Japan," United States International Trade Commission, USITC Publication 2413, Washington, D.C., August 1991, pp. 35-36.

manufacture laptops in California. Thus, the duty forced Toshiba to fire American workers, close the plant, and begin assembly of laptops back in Japan. And because the duty applied only to the flat panel screens, a completed laptop computer that included the screen was not subjected to the duty.

Apple abandoned plans to manufacture laptop computers in Fountain, Colorado, in favor of Cork, Ireland, to avoid paying the duties. IBM also announced that it was considering moving its production facilities abroad.[n28]

Example: Antifriction Bearings. U.S. antidumping laws allow even the smallest American firm to initiate a dumping charge, no matter how much the domestic demand might be for the foreign products in question. This allowed a small U.S. manufacturer of ball bearings, the Torrington Company of Torrington, Connecticut, in 1988 to accuse virtually all of the world's bearing manufacturers with dumping in the U.S. The company claimed that firms in nine countries were acting to undermine Torrington's competitiveness.

On October [sic] 1988, the ITC initiated an investigation against bearing manufacturers in Britain, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and West Germany. In a May 2, 1989, press release, Torrington Company President Thomas E. Bennett stated, "There is clear evidence that dumping has caused long-term, fundamental damage across the entire bearing industry, affecting all product types. We will continue to monitor with great vigilance all bearing imports and will not hesitate to take strong action again to challenge additional unfair trade practices that are identified."[n29]

[n28] "Did Washington Lose Sight of the Big Picture?" Business Week, December 2, 1991, p. 38.

[n29] "Landmark, Dumping Decision Praised by U.S. Bearing Manufacturer," Torrington Company, Torrington, Connecticut,

Yet before the investigation, domestic bearing manufacturers were unable to supply enough bearings to meet domestic demand. In fact, many U.S. manufacturers who use ball bearings in their products testified at ITC hearings that they were unable to find any domestic producers that could fill their orders. Moreover, in the orders that were accepted by domestic ball bearing manufacturers, some companies did not receive shipments in time and in some cases, not at all. Many American users of ball bearings testified in the investigation that Torrington had a long history of failing to supply agreed-upon shipments of bearings. Indeed, the American Manufacturers for Trade in Bearings released a statement during the investigation declaring that "[f]oreign producers and domestic consumers of antifriction bearings emphasized both delivery and reliability problems in their experiences with Torrington."

Despite this, the Commerce Department found dumping margins ranging up to 212 percent with an average rate of about 60 percent. As a result, the Department established duty rates based on the dumping margins, and many American manufacturers that use ball bearings, like the Briggs and Stratton Company, the General Electric Company, Hewlett-Packard, and IBM, were forced to pay higher prices for imported bearings, because domestic suppliers still could not meet the demand. These duties increased the cost of production of such products as electronic motors, household appliances, office equipment, and power tools, which have been passed along to consumers in the form of higher prices. Increased component costs also have made the products of American firms less competitive abroad.

Torrington still was not satisfied. In 1990, it pressed new charges against firms in thirteen additional countries: Argentina, Austria, Brazil, Canada, China, Hungary, South Korea, Mexico, Poland, Spain, Taiwan, Turkey, and Yugoslavia. This time the

---

press release, May 2, 1989.

ITC threw out the case ruling that no material damage was done.[n30]

Example: Uranium. Occasionally a U.S. government agency, rather than a private company will request an investigation. In 1992, for instance, two U.S. government-owned uranium mining companies -- one in Ohio and the other in Kentucky -- requested that the Department of Energy start an action against uranium imports from countries of the former Soviet Union. Until recently, these two companies had a virtual monopoly on uranium production outside the Communist world, allowing them to charge higher prices. The Commerce Department found Kazakhstan, Kirgizstan, Russia, Tajikistan, Ukraine, and Uzbekistan were exporting uranium to the U.S. at a price that was not fair to the U.S. government-owned mining facilities. The Commerce Department attached a 115.82 percent dumping duty on the imports.[n31] Unable to obtain information from the republics, the Department used production information supplied by the petitioners, that is, the two government-owned companies and the Department of Energy, and the cost of production in the African country of Namibia to determine the production costs in the former Soviet republics. This is ironic since one justification for American countervailing duty law is to counter government-sponsored or subsidized production and exports from other countries to the U.S.

If the final decision, expected in August, on this dumping case goes against the former Soviet republics, they could be assessed retroactive duties. But the Bush Administration and Congress currently are debating the amount of foreign aid to give to the former Soviet republics. It would be ironic if duties are

---

[n30] "U.S. Market of Ball Bearings Loses New Dumping Case," The New York Times, March 28, 1991, p. D5.

[n31] "Commerce Dept. Rules Ex-Soviets Guilty of Uranium Dumping," The Washington Post, May 30, 1992, p. A18.

imposed on these uranium imports, forcing republics to use American foreign aid dollars to pay dumping fines assessed by the U.S. government.

The Retaliation Against U.S. Firms

Many American businesses are growing concerned about the enforcement of international antidumping laws. The U.S. has made extensive use of dumping laws to keep out foreign imports, and other countries have begun to learn that this is a way to introduce protectionist policies without running afoul of the GATT rules. American laws have not become the model for dumping legislation. More and more countries have increased dumping charges against U.S. firms. From 1980 to 1988, for instance, Canada initiated 55 investigations against U.S. companies, Australia initiated 52 cases, the European Community 23 cases, Mexico fourteen, and Argentina six cases, most of these in the past few years.[n32] Significantly, several countries are using U.S.-style antidumping laws against American products, South Korea, for example, found in 1990 that America's DuPont Chemical Company was dumping plastic resin at prices 30 to 90 percent higher than their home prices. A 40 percent to 50 percent duty was recommended.[n33]

WHAT THE U.S. SHOULD DO

The procedures used by the Department of Commerce to determine if dumping has occurred are unfair and in many cases result in harm to U.S. firms as well as higher costs to U.S.

[n32] "Some Big U.S. Companies Favor Loosening Anti-Dumping Laws," The Wall Street Journal, August 31, 1990, p. A2.

[n33] "A Korean Firm's Dumping Charge Takes DuPont, Two Others, By Surprise," The Wall Street Journal, November 8, 1990, p. A20.

consumers. To make the procedures fairer, and to help stop the danger of retaliation against U.S. firms, the Bush Administration should:

1) Seek agreement in the current round of General Agreement on Tariff and Trade talks for a multilateral phase-out of dumping laws in exchange for stricter limits on government subsidies to industries. Like the European Community, the U.S. has been unduly stubborn in negotiating certain reforms in the current Uruguay Round of GATT. One such reform is the reduction of excessive use of antidumping laws and countervailing duties. The U.S. is the biggest abuser of such laws. There is an international consensus to limit such laws, but U.S. trade negotiators refuse to consider reform. The Bush Administration, working through the United States Trade Representative's Office, should work hard to modify or dismantle potentially dangerous laws, while pursuing agreements to end government subsidies for exporters.

2) Commission a study of the damage done to American businesses and consumers by antidumping laws. Antidumping duties cost the U.S. economy millions, perhaps billions, each year in higher prices, lost jobs, and declining competitiveness. No significant studies on these costs have ever been conducted. The Bush Administration should commission an objective study of these laws to determine the cost incurred from their usage.

3) Propose interim legislation that incorporates the initial intent of the Antidumping Act of 1916. The original intent of America's antidumping legislation was to prevent "predatory pricing" by foreign firms. This required the U.S. government and the petitioning American company to prove that the foreign firm was pricing their product with the specific goal of driving the U.S. company out of business. If this could not be proven, then no dumping duties would be applied to the foreign product. While waiting for an international agreement to end these damaging trade laws, the Bush Administration should propose interim legislation that requires the Commerce Department and the U.S. firm

requesting the investigation to prove that predatory pricing was being utilized. This will eliminate some of the most abusive rulings that occur under current laws.

CONCLUSION

The United States government is raising costs for American consumers and in some instances undermining American competitiveness, all in the name of fair trade. Supporters of U.S. antidumping laws say such laws are needed to prevent foreigners from destroying American jobs and industries. But in practice the application of these laws in many instances causes more damage and creates more problems than it solves. Thanks to duties imposed as a result of antidumping laws, U.S. manufacturers of such products as computers, medical equipment, and machine tools are paying increased prices for the components they import to manufacture their products, raising production costs and making their exports less competitive in world markets. In some cases, such as computer components, U.S. firms have effectively been denied needed supplies. And many American jobs are lost when domestic manufacturers feel forced to move overseas to avoid high duties on their imported components.

While the Bush Administration has been a strong advocate of free and open trade by supporting such policies as the free trade agreement with Mexico, and the trade liberalization efforts of GATT, it has done little to address counter-productive U.S. trade laws. If the Bush Administration truly wants to make America more competitive and to avoid an increase in back-door protectionism through the wider use by countries of antidumping laws, it will take urgent action to reform the practices of its own officials.

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Copyright 1990 The Washington Post

The Washington Post

December 25, 1990, Tuesday, Final Edition

SECTION: EDITORIAL; PAGE A19

LENGTH: 996 words

HEADLINE: Down the Commerce Dept.'s Manhole

SERIES: Occasional

BYLINE: Thomas N. Thompson

DATELINE: SEATTLE

BODY: My company's problem with the U.S. government began this past summer. It involved our efforts to import manhole covers from China. I admit this is a fairly obscure product, but the grief we have had over it is a good indication of more widespread difficulties faced by U.S. firms and their foreign counterparts as they seek to expand East-West economic ties.

What happened last summer was that the Commerce Department announced it had preliminarily decided -- retroactive to 1987 -- to increase duties on China-origin manhole covers from the current 11 percent to as much as 97 percent. Commerce's final determination, it was cheerfully promised, would be made before the New Year. My company's assessment will likely be in the millions of dollars. Bankruptcy looms.

Looking back over my company's six years of business in China, it is not as if we have had an easy time of it. China has become well known as a difficult, frustrating business environment. Our own profit margin of 5 or 6 percent on manhole

covers, essentially a commodity business, is ample testimony to this fact.

What we never expected, though, was to be submarined by Uncle Sam. Yet the Commerce Department has enthusiastically, and unfairly, in my view, sided with an unhappy coalition of primarily eastern U.S. foundries that have argued that Chinese exporters are "dumping" manhole covers in the U.S. market -- that is, selling at "less than fair market value." Commerce proposes to punish U.S. importers for the alleged sins of the Chinese exporters.

It apparently does not matter that not one of the U.S. coalition foundries is located within 1,500 miles of Seattle, or that we sell these products only to a Seattle-area foundry not in competition with any of the coalition foundries. Maybe our Chinese supplier is "dumping" products elsewhere in the United States? Not likely -- my company is its only U.S. buyer.

But these are mere practical matters, and not of relevance to the policy makers and attorneys who are having a field day in a genuine growth industry: the interpretation of U.S. trade law. What, after all, is "less than fair market value?" The issues are complicated, even in a market economy, but in a non-market economy, the U.S. Commerce Department makes them next to impossible.

Unfortunately, in the case of China, the Soviet Union and, still, most of Eastern Europe, none of these countries' production costs or sales prices are market-based. This means they are not considered relevant for scrutiny under U.S. trade law, which requires the imposition of a special anti-dumping duty on imported goods the U.S. International Trade Commission has decided are materially injuring U.S. industry. (The anti-dumping duty is the difference between the "fair" value and the dumped price.)

Nobody has suggested the alternative of excluding nonmarket economies from U.S. trade law. But the fabricated

solution employed by Commerce is incredible: the use of a "surrogate" country to give artificial birth to piecemeal, fabricated data as if it were meaningful. In our case, for example, Commerce arbitrarily decided that production costs in China are comparable to those of the Philippines, which has zero percent share of the U.S. manhole-cover market.

Commerce employed this method even though no Philippine foundry was willing to provide production cost data. The reason is that the information a surrogate supplies can be used against it in the future, as a Finnish steel plate producer learned after agreeing to serve as a surrogate in a review of steel plate from Romania. The Finnish producer's reward for cooperating was to be the subject of an antidumping review itself.

Commerce analysts, who admit that the Philippine surrogate methodology is problematical, persisted. They "constructed" the imaginary costs for raw materials from the United States, Britain and Japan imported into the Philippines only to be exported back to the United States as manhole covers! One interesting result of this process is that sand was found by the sagacious Commerce Department analysts to be more expensive than pig iron -- a notion that would make the Sahara Desert truly the world's greatest untapped storehouse of wealth.

The choice of a surrogate, never announced by Commerce beforehand, can make an enormous difference. For Chinese manhole covers, in its 1986 review Commerce compared Belgian, Canadian, French and Japanese manhole covers and "constructed" an 11 percent anti-dumping duty. Now Commerce has decided to use the Philippine surrogate, with the result being a 97 percent duty! This in spite of the fact that, except for price increases, the Chinese selling practices have been consistent over the years.

Other recent cases have been even more dramatic. A review of potassium chloride from what used to be East Germany included a preliminary duty of 112 percent. However, in the final

determination, Commerce changed surrogates and the 112 percent duty was reduced to zero.

Because of this crazy methodology, there is no way a foreign exporter, or a U.S. importer, can know in advance the country, or even group of countries, whose production costs -- real or imaginary -- will be used to provide the measure of "fair value."

The surrogate method also negates any advantage that China or, say, the Soviet Union, might enjoy as a low-cost manufacturer. China obviously enjoys a comparative advantage in labor costs. But this comparative advantage is eliminated when those units of labor are valued at prices that prevail in a country that does not share China's low level of economic development. China is also self-sufficient in the requisite raw materials for manufacturing manhole covers. The Philippines is not.

Recently, in retaliation for Commerce's antics, a Chinese buyer suspended negotiations with us for the purchase of nearly a million dollars in U.S.-made construction machinery.

The writer is president of Overseas Trade Corp. in Seattle.

GRAPHIC: ILLUSTRATION, T. GIBSON

March 3, 1993, Wednesday

1993 DER 40 d14

SECTION: REGULATION, ECONOMICS AND LAW; 40.

LENGTH: 606 words

HEADLINE: European Community, EC REQUESTS GATT CONSULTATIONS CONCERNING U.S. STEEL DUMPING DUTIES

BODY: BRUSSELS--The European Community Commission formally requested consultations with the United States, under General Agreement on Tariffs and Trade rules, on the U.S. Department of Commerce's preliminary antidumping duties on imported steel products, EC spokesman Peter Guilford announced March 2.

The EC's ambassador to GATT addressed a letter March 2 to GATT Director General Arthur Dunkel requesting formal consultations, which are the first stage in the GATT's dispute settlement procedures, Guilford said.

Guilford said, however, that "launching this first stage does not automatically mean the EC will go to the final stage and request the formation of a panel" of third countries.

The spokesman said that "the timing for these consultations was not yet clear."

The EC requested the consultations under the GATT Antidumping Code. "The Community is urgently consulting with the United States in order to verify whether the GATT rules have been respected both in procedural and substantive terms," according to an EC Commission statement released in Washington.

At issue is Commerce's preliminary determination Jan. 27 to impose provisional antidumping duties on steel products from 19 countries, including $ 1 billion worth of steel products from seven EC countries, ranging from 0.88 percent duties on imports from some Belgian companies to 109.22 percent on imports from the United Kingdom of flat-rolled steel products. Other EC countries affected are France, Germany, Italy, the Netherlands, and Spain. In late 1992, Commerce introduced preliminary countervailing duties on the same products.

Countervailing Consultations

The two sides Feb. 26 had their first consultations, under the GATT Subsidies Code, regarding the countervailing complaints. During the meeting, the EC criticized the way Commerce defined a subsidy and the methodology used to determine or calculate subsidies. The two sides agreed to continue the talks "in the very near future," the EC statement said.

EC Commission officials March 2 placed full blame for the steel dispute on the U.S. International Trade Commission. An official said, during a background briefing, that when U.S. companies filed their 84 dumping and countervailing duty petitions against steel imports in June 1992, "the case for injury was so weak that the ITC should have simply thrown out the case" in its preliminary ruling that is the first formal step in U.S. trade complaint procedures.

The emphasis on the ITC's responsibility suggests that the EC Commission is placing a good deal of hope in the independent organization's capacity to reverse its initial finding of injury when it hands down its final injury determination in the countervailing duty cases, expected in late May.

Within the bilateral antidumping consultations, the EC will seek clarifications about the antidumping complaint's substance and procedures. During the talks, the EC will raise its concerns over what it believes is Commerce's arbitrary approach to using

the best information available in calculating margins and market shares of foreign competitors. Under GATT rules, when a respondent in a case either declines to provide information or provides inadequate information, the investigating authority has the right to resort to other information.

An EC official said that the EC "relies on a variety of sources when no information comes from a defendant."

"We have the impression that the DOC made no serious effort to get the appropriate information," the official said, and it was easily satisfied "with relying on information provided by the U.S. complainants."

Copyright 1993 The Washington Post

The Washington Post

July 12, 1993, Monday, Final Edition

SECTION: EDITORIAL; PAGE A14; LETTERS TO THE EDITOR

LENGTH: 419 words

HEADLINE: 'Quarreling Over Steel'

SERIES: Occasional

BODY: The Post's June 24 editorial "Quarreling Over Steel" makes some sound points but ducks the hard questions. If the U.S. laws are unreasonably and unfairly written and administered -- as they are -- then it is by no means clear that "the litigation over steel is a great deal better than the import quotas that preceded it."

Go down to the Commerce Department and the International Trade Commission and browse through the tons -- yes, tons -- of paper being processed, think about the hours and millions of dollars spent by parties and the U.S. government, about the implications of possible penalty duties ranging up to more than 100 percent, about the use of the petitioners' guesses instead of the respondents' data, about the weird calculations of the effects of subsidies, about the years of likely appeals to two judicial levels, about the absence of any authority under the U.S. laws anywhere in the government to consider the public interest or to rationalize the results into some sensible pattern over petitioners' objections, and then consider whether this is really better than the previous quotas.

The United States stands alone in the Uruguay Round and the multilateral steel agreement negotiations in insisting that

nothing should be done to modify the arbitrary U.S. laws and practice. The block in the negotiations is not foreigners' refusal to eliminate subsidization, but the refusal of the United States to consider any restraint under the antidumping and countervailing duty laws.

The fact is that, mainly because of the U.S. example, "unfair trade" laws are, all over the world, replacing import limitations adopted on policy grounds. In the European Community this is mitigated by fixing duties supposedly related to the degree of injury (i.e., discretionary), rather than to the margin of dumping or subsidization. Dumping and subsidization cases are simply forms of protectionism, but ones that in the United States are irrational and capricious, involving interminable and horribly expensive proceedings. The bureaucrats and lawyers who work in the system know this well, as do some academics, and there is a growing movement for change, some of which could be accomplished in the Uruguay Round. But as is often true, most of the people who understand the system have no incentive to try to change it. Perhaps our foreign friends will make us face up to it. NOEL HEMMENDINGER Washington

The writer is counsel to a law firm that represents respondents in the steel cases.

Copyright 1992 McGraw-Hill Inc.

Nuclear Fuel

June 22, 1992

SECTION: Vol. 17, No. 13; Pg. 1

LENGTH: 981 words

HEADLINE: YELTSIN RAPS U.S. ANTIDUMPING DUTIES AT SUMMIT, HIS PRIME MINISTER CHIMES IN

BYLINE: Wilson Dizard III, Washington

BODY: Russian Federation President Boris Yeltsin strongly criticized U.S. antidumping duties on U and SWU from six republics of the former Soviet Union at a meeting in Washington with U.S. President George Bush and Secretary of Commerce Barbara Hackman Franklin in attendance.

Yegor Gaidar, Yeltsin's designated prime minister, also slammed the duties as "unfair" in a speech at the U.S.-Russian Business Summit held in conjunction with the meetings of the world leaders.

"We discussed with Mr. Bush and Mrs. Franklin yesterday the question, how is it that the cheapest uranium from Russia cannot be coped with here, or accepted by Western businessmen, because the law is...(116%) duties, and I told Mrs. Franklin we should be afraid of God," Yeltsin said, according to a transcript of the meeting. "You are a believing woman, after all, how can you charge such high rates?" Yeltsin made his remarks to the meeting of chief executive officers of U.S. companies with top Russian economic officials.

Gaidar, who was designated prime minister of Russia by Yeltsin less than a week before the world leaders' meeting, told

the gathered businessmen that "Economic cooperation is not a one-sided street. We are the best producer (of uranium); we are the cheapest producer. We used to use it for nuclear bombs that were aimed at America. Now the best possible use is to sell it in the American market.

"But, of course, we will have to remove the unfair trade restrictions...Of course, I do understand that vested interest groups are everywhere." Gaidar said it would be impossible to develop a market economy in Russia in the face of such trade restraints.

The Russian leaders' remarks appeared to cause consternation among U.S. officials, notably Franklin, according to attenders at the meeting. After Gaidar spoke, Franklin said the U.S. would do its best to work out the trade dispute. Franklin said that lawyers on both sides of the issue were negotiating.

Franklin's statement that lawyers were negotiating could not be confirmed by attorneys active in the case. They either declined to comment on the matter or were not available for comment. One source close to the case said that Commerce Department lawyers had shown no sign of compromise in recent discussions of the case. Cheryl Crispin, a Commerce Department spokesperson, said the U.S. did not negotiate on antidumping cases. A legal pathway by which the U.S. could remove the antidumping duties through negotiations with the six former Soviet republics has been suggested by a senior Commerce Department attorney to his superiors (NF, 8 June, 3).

Franklin said the Commerce Department would send attorneys to Russia to avoid trade disputes in the future. Crispin said Franklin was referring to technical assistance on legal structures in Russia.

The trade dispute was one of the few clouds in the sunny atmosphere of the Bush-Yeltsin summit, which was marked by the signing of accords on nuclear arms reduction and economic affairs.

Legal clashes continued in the lower-level action in the antidumping case. Techsnabexport, Global Nuclear Services & Supply Ltd. and Nuexco Trading Corp., the respondents in the antidumping case, filed a motion for judgment on the agency record with Judge Jane Restani of the Court of International Trade in New York June 12. Their motion challenged the Department of Commerce's determination to convert its antidumping investigation of U imports from the Soviet Union to an investigation against twelve different countries. "That determination was based upon a general construction of the antidumping statute and an application of that statute to the facts of this case both of which were fundamentally flawed and contrary to law," according to the motion.

Ukraine and Tajikistan, which are jointly represented in the antidumping case before the trade court, also filed a motion for judgment on the agency record June 12. As in the respondents' motion, the two republics held that the antidumping law "does not allow the (Commerce) Department to proceed with an investigation against countries other than the one against which it was initiated...." Under the rules of the trade court, the Commerce Department and the defendant intervenors who seek the dumping duties -- the Ad Hoc Committee of Domestic Uranium Producers and the Oil, Chemical, & Atomic Workers union -- have 30 days to respond to the motions for judgment.

The Russian Federation entered an appearance in the trade court through the Coudert Brothers law firm, which filed an application for a preliminary injunction against the antidumping duties. Coudert Brothers had earlier entered a motion to intervene in the case, though its arguments were not heard when Restani held a hearing on the earlier motion by the respondents for a preliminary injunction in the case (NF, 11 May, 3).

The International Trade Commission (ITC) gave notice of its final investigation in the antidumping case, in which it will determine whether the U.S. industry has been injured or is threatened with injury as a result of dumping from the six

republics covered by the Commerce Department's 115.82% preliminary antidumping duties (NF, 8 June, 1). The six republics are Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan. The case has been split into six parts to accord with the political dissolution of the former Soviet Union. The commission staff scheduled a hearing for August 13 in the case. ITC staff suggested a date of September 21 for the commissioners to vote, with final notification of Commerce set for September 29.

Foes of the antidumping duties scored a public relations victory June 8 when the Wall Street Journal ran a column strongly critical of the Commerce Department duties on its editorial page. James Bovard, writer of the article, termed the case a "national embarrassment."

Copyright 1992 Forbes, Inc.

Forbes

September 28, 1992

SECTION: LAW AND ISSUES; On The Docket; Pg. 64

LENGTH: 677 words

HEADLINE: Dump it

BYLINE: By David Frum

HIGHLIGHT: Here's all you need to know about why the 1974 antidumping law is arbitrary, capricious and economically nonsensical.

BODY: THERE ARE TWO ways to make money in the steel business. One is Ken Iverson's. He's the chairman of Nucor Corp. of Charlotte, N.C., the seventh-largest steel company in America. Iverson sells high-quality steel cheaply. Unsurprisingly, he's for free trade. The other way is big steel's: Exploit the 1974 antidumping law to drive your foreign competition from the market, and then raise prices.

On June 30, 12 U.S. steelmakers lodged 84 antidumping and countervailing duty complaints against 21 foreign countries, filling 2 million mind-numbing pages. Seventy-two of those complaints survived the International Trade Commission's preliminary scrutiny and are being investigated by the Commerce Department. For the companies under investigation, it's a quick descent into legal hell.

The theory of dumping is that a foreign company sells its products below cost to drive its U.S. competition out of business, monopolize the U.S. market and raise prices later. Dumpers can afford to dump, the theory holds, because their governments seal

off their home markets by protectionism, enabling dumpers to earn megaprofits to finance their predation.

However, in the market for steel, it is the U.S. that is sealed off. "Our quotas and import barriers," says Nucor's Iverson, "are as bad as any and worse than many." Nor does it seem very probable that the entire international steel industry, from Britain to Japan, from Brazil to Belgium, and including America's free-trade partners Canada and Mexico, has conspired to sell steel below cost in order to drive U.S. Steel and Bethlehem out of business.

Even so, the steel industry, like 97% of complainants before the Commerce Department since 1988, is likely to win. The elaborate structure of the U.S. dumping law can be summed up in two words: plaintiff wins.

Why? The U.S. complainant can take as much time as he likes to prepare his complaint -- 18 months in this case. But the respondent foreign company is held to a rigid 45-day deadline, within which it must fill out an excruciatingly detailed questionnaire about its pricing policies.

At one of those respondents, Trade Arbed in New York, the importing agent for Belgium's Sidmar Steel, a dozen employees are now compiling data for every one of the 20,000 transactions with 1,000 different customers over the past six months. There are as many as 50 variables to be reported for every transaction.

Trade Arbed and the other accused dumpers slave to deliver these numbers because, if their presentation is judged to be in any way lacking, Commerce will simply accept the numbers concocted by the U.S. complainant. Trade Arbed estimates it will cost at least $ 500,000 in legal fees alone to defend the case.

But that's not the worst of it. * Each and every U.S. sale will be compared with the average price that prevailed in the

exporting country over that period. If any sale was below the average, it will be deemed to have been "dumped." Above-average sales are ignored. * Rather than compare the exporting company's U.S. prices with its home market prices, Commerce will likely end up using "constructed value" -- an intellectual monster from the same planet that sent earth Soviet central planning and feminist comparable worth. Under constructed value, an exporter can be convicted of dumping if it earned less than an 8% profit on any sale.

Nucor's Iverson says, "If it's dumping to earn less than 8%, then almost no domestic company could sell steel here."

While the steel importers are struggling with the Commerce Department's paperwork, the U.S. industry is profiting nicely. The U.S. market for the products under investigation is 40 million tons a year, of which just 6 million are supplied by imports.

The U.S. industry is already lustfully anticipating a price hike this fall. If the antidumping actions can help make even a $ 10-a-ton price increase stick, the U.S. industry will pocket an extra $ 340 million -- a nice return on the $ 20 million or so it has budgeted for this litigation.

GRAPHIC: Picture, no caption, Patrick McDonnell

Copyright 1992 Information Access Company;

Copyright Capital Cities-ABC Inc. 1992

American Metal Market

March 24, 1992

SECTION: Vol. 100 ; No. 57 ; Pg. 14; ISSN: 0002-9998

LENGTH: 988 words

HEADLINE: Education on open trading system needed; excerpt of Doreen L. Brown speech; Transcript

BODY: Several studies have been published recently, and many newspaper and magazine articles have appeared, decrying the unfairness and illogic of anti-dumping laws. In his book "The Fair Trade Fraud," James Bovard devotes a chapter to what he entitles "The Bureaucratic War on Low Prices." Michael Knoll, an assistant professor at the University of Southern California Law Center, who also served as special assistant to two chairmen of the International Trade Commission, has done a paper called "Dump our Anti-dumping Law" and there is a brand-new book out of the Brookings Institution called "Down in the Dumps."

All of these stress the fact that the original purpose of these laws--predatory pricing--has been abandoned, probably because almost no cases of predation could be found.

Now, it is only a matter of whether lower-cost imports are an economic inconvenience for a domestic industry. Price comparisons between the selling price in America and the arbitrarily "constructed" price in the home country are arbitrary and frivolous, ignoring exchange rate fluctuations, comparing unlike products, deducting certain costs such as freight, port charges and insurance from one but not the other, comparing the wholesale price in the United States to the retail price in the

foreign country, an average selling price over six months in the home country to a single selling price in the United States, assigning higher profit margins to foreign producers (8 percent) than that of most American competitors and other such shenanigans.

As James Bovard points out, our anti-dumping laws protect the competitor, not competition.

The unfortunate part of this whole story is that there is very little we or any of the other enlightened members of the trade community can do to either reform existing laws or get rid of them altogether.

The more-protectionist members of the trade community, and some of the less-protectionist--the fair-trade, level-playing-field crowd--as well as members of Congress cling to anti-dumping laws as the last bastion of protection against imports.

"Don't touch our anti-dumping laws," members of Congress have been warning both the North American free-trade agreement (NAFTA) and the Uruguay Round negotiators, "or it will be impossible to get congressional approval for the negotiations." Their threats are being taken seriously by all concerned. The trouble, I've been told by some top-level congressional staff, is that, with the exception of a very few legislators, most congressmen don't understand what anti-dumping is all about.

There is a cloak of respectability over anti-dumping. After all, there is an international anti-dumping code under the General Agreement on Tariffs and Trade, which was negotiated during the Kennedy Round, which mirrors the U.S. laws in some of its inconsistencies and illogic. Let me quote from President Bush's recent economic report: "Anti-dumping and countervailing duty laws are primarily motivated not by economic efficiency concerns, but by concern for fairness to the import-competing

industry." This concern is embodied in the criterion under which dumping is actionable under GATT.

A finding that dumped products have injured the domestic industry is both necessary and sufficient to permit the imposition of anti-dumping duties, regardless of the effect on consumers. The challenge to negotiators in the Uruguay Round has been to strengthen the GATT rules, particularly in the area of anti-circumvention provisions, while at the same time ensuring that such trade remedies are not misused for protectionist purposes.

In that respect, I must say that Arthur Dunkel has done a remarkable job. Unfortunately, he has not really eased the laws in any way. But he has added some refinements that should please, to a degree, people like us and other critics of the present process.

Among the proposals in the Dunkel test that we consider an improvement, though far from perfection, are:

* An increase in the de minimis rule from 0.5 percent to 2 percent.

* Requiring dumping charges to expire in a maximum of five years unless the government specifically determines that the duty should be extended.

* Consistent rules for price comparisons.

* Eliminating dumping charges that result solely from fluctuating rates by comparing exchange rates on the date a contract is made.

* And last, but certainly not least, allowing consumers to be heard in dumping cases to ensure that the government considers the impact of a dumping finding on every sector of the economy.

As I've said, these are minimal changes which, unfortunately, do not address themselves to the economic illogic of dumping rules and do not, in fact, weaken the rules themselves.

As someone tried to explain to an incensed congressman: You can change the upholstery inside your car, or the paint job outside the car, but you still have the same engine and the effectiveness of that car has not been weakened. But the Hill doesn't see it that way and critics of the Dunkel proposals abound in Washington.

Consequently, any changes in the dumping code could easily derail both the Uruguay Round and NAFTA negotiations. And if we don't have much hope for reform, we certainly have even less hope for dumping altogether, particularly in today's highly politicized trade environment.

Which brings us back to square one. What we will need in 1992, and for some years after, is a huge education job on what every step backward from an open trading system can do to our vulnerable national economy and to our vulnerable consumers.

I am pessimistic enough to believe that things, in terms of trade, will get worse before they get better, but also optimistic enough to believe that at some point in time, in this everchanging interdependent world, economic suicide will be replaced by economic common sense.

Copyright 1993 Financial Post Ltd.

The Financial Post

December 18, 1993, Saturday, WEEKLY EDITION

SECTION: SECTION 5; SPECTRUM: Comment and Opinion; WHAT'S RIGHT; Pg. S2

LENGTH: 696 words

HEADLINE: GATT does nothing to wipe out new protectionism

BYLINE: DAVID FRUM; David Frum is law editor of Forbes magazine in New York.

BODY: Suppose all the military powers were to convene in Geneva and agree to ban the use of bayonets and bazookas in war. Would that be a step toward world peace? Well yes, up to a point. But it would rather beg the question of why they were taking action against obsolete weapons while leaving nuclear warheads and germ warfare alone.

That analogy explains why free traders should feel only very tepid enthusiasm for the GATT agreement so triumphantly announced this week. GATT members have agreed to cut tariffs - the taxes nations impose on goods produced in foreign countries. But after 45 years of tariff-cutting, tariffs alone have long since ceased to be the major obstacle to open international trade. Even in the Third World, where tariffs remain higher than in Europe, Japan and North America, trading nations like Mexico and Chile have been unilaterally cutting tariffs for a decade.

No, the main threat to open trade nowadays is what trade experts call the "new protectionism:" tricky devices invented in the 1970s and 1980s to circumvent GATT's rules without quite breaking them. And the new protectionism has survived this latest GATT round virtually unscathed.

The U.S., for example, hardly maintains any tariffs at all - U.S. tariff levels average barely more than 3%. Instead, the U.S. government protects its industries from competition with a battery of absurd "dumping" laws that enable U.S. companies to entangle their foreign competitors in endless bureaucracy. The theory behind the dumping law is that foreign competitors may sell their goods below cost in order to drive American firms out of the market.

Since even the most treacherous foreigner will find it difficult to sell below cost without going broke itself, dumping is something you'd expect to occur only very rarely and only under specially favorable circumstances. However, the U.S. Department of Commerce finds foreign firms guilty of dumping - and slaps huge penalties on them - in more than 90% of all cases. How is that possible? Because to be guilty of dumping under U.S. law, you don't have to sell below your actual costs; you need only sell below the price that the U.S. Department of Commerce believes your costs ought to have been, including a juicy 8% profit margin.

Thanks to the dumping laws, and other such gizmos, nearly one-quarter of all imports into the U.S. are now subject to some form of special trade restriction, up from less than 12% in 1980. And the dumping law - which is also practiced by Canada and the European Community, though rarely as blatantly unfairly as in the U.S. - is left almost untouched by the new GATT agreement.

So are most of the other non-tariff trade-choking practices. Japanese and Asian objections crushed hopes that the new trade agreement would protect banks, insurance companies, law firms and other service businesses from arbitrary actions by foreign governments. European objections dashed the prospect of free trade in food. The first glimmerings of free trade in clothing and textiles will have to wait at least a decade.

And here's the most depressing news of all: the GATT talks failed to accomplish more because the member countries that

compose GATT didn't want them to accomplish more. The generation that remembers how protectionism caused the Depression and thus a world war is passing from the scene, to be replaced by an arrogant new generation of world leaders who imagine that their industrial plans are cleverer than the market.

The very worst of these new protectionists inhabit the hideous European Community concrete bunkers in Brussels, but the new Clinton administration is nearly as bad. One disturbing manifestation: in a reversal from the previous policy of Democratic and Republican administrations alike, all of whom have wanted to curb government subsidies to industry, Clinton demanded greater freedom to subsidize industrial research without triggering trade penalties. The new agreement permits governments to pay up to 50% of private industry's research tab.

None of this is to say that the GATT agreement is bad news. Of course it's good news. It's just rather beside the point.

GRAPHIC: Photo: Trade Minister Roy MacLaren and U.S. Trade Representative Mickey Kantor thrash out GATT details. But did they miss the point?

Copyright 1994 The Heritage Foundation

Heritage Foundation Reports

July 18, 1994 (Updating Backgrounder No. 985)
"A Guide to the New GATT Agreement,"
May 25, 1994, and Backgrounder No. 906,
"A Guide to Antidumping Laws: America's
Unfair Trade Practice," July 21, 1992.)

SECTION: BACKGROUNDER UPDATE; No. 229

LENGTH: 4133 words

HEADLINE: HOW THE SPECIAL INTERESTS WANT TO AMEND ANTIDUMPING LAWS

BYLINE: Joe Cobb, John M. Olin Senior Fellow in Political Economy

BODY: To implement the new General Agreement on Tariffs and Trade (GATT) agreement, which was signed on April 15 by the United States and 124 other governments in Marrakech, Morocco, Congress will need to make a number of changes in current U.S. trade law. This will be done in the form of a "fast track" bill.[a1] Such a bill essentially is negotiated between congressional leaders and the White House, and it will be put to Congress for an up-or-down vote without amendment.

Unfortunately it now seems likely that Congress will be asked to include measures to "strengthen" the U.S. antidumping

---

[a1] The provision for "fast track" consideration of the GATT Uruguay Round implementing legislation is found in P.L. 103-49, July 2, 1993.

law in the bill.[2] But if enacted, the antidumping provisions actually would result in increased trade barriers worldwide and undermine the intent of the new GATT agreement. By including these provisions, the White House and protectionists in Congress seem determined to go against the sound observation of the President's Council of Economic Advisers, which reported earlier this year that "Both in the United States and elsewhere, antidumping laws go beyond preventing anticompetitive practices -- which should be their rationale -- and often have the effect of protecting domestic industries from foreign competition."[3]

The U.S. antidumping law has become the primary legal tool invoked by domestic industries supposedly to protect themselves from unfair trade by imports, but in reality to shield

---

[2] See Committee on Ways and Means, "Draft Legislative Language for the Administration's Implementing Proposals on the Uruguay Round Antidumping Agreement and Corresponding Provisions in the Subsidies Agreement," July 12, 1994. For a summary of current U.S. antidumping law, see Committee on Ways and Means, Overview and Compilation of U.S. Trade Statutes (Washington, D.C.: U.S. Government Printing Office, 1993), pp. 62-71. See also, "Administration AD/CVD Proposals," Inside U.S. Trade, Special Report, June 21, 1994, pp. S2-S22, and "Summary of AD/CVD Proposals," Inside U.S. Trade, Special Report, June 17, 1994, pp. S2-S8. Lobbying to influence the antidumping sections of the GATT implementing legislation is reported in Robert Keatley, "More Protectionism May Be the Result As Congress Studies Dumping Laws," The Wall Street Journal, July 1, 1994, p. A10; "Dumping on Importers," The Journal of Commerce, June 30, 1994, p. 10A; and Helene Cooper, "Corporate America Finds Devil Is in the Details As Its Lobbyists Press Congress to Change GATT," The Wall Street Journal, June 27, 1994, p. A14.

[3] Council of Economic Advisers, Economic Report of the President, February 1994, p. 239. Emphasis in original.

themselves from competition. Dumping is the practice of selling goods in one market at a price below that charged in another market. The notion of a "fair value" is usually associated with the higher price by industries competing against the lower price, and the antidumping laws are used to impose a tariff on the "unfair value" of the lower-priced goods. Seasonal department store clearance sales and promotional price cutting are normal business practices in domestic commerce, and may lead to prices that are lower than "costs" figured in certain ways. But under the antidumping laws, the same price and cost structure used by an exporter to the United States could be considered a violation of U.S. law.

Around the world, this kind of protectionism has been growing as tariffs and other non-tariff barriers have come down. Indeed, more dumping cases have been filed annually against U.S. exporters around the world in recent years than against any other country.[84] The U.S. economy produces the world's largest volume of exports, and therefore is the most vulnerable to the abuse of antidumping laws. Instead of benefiting the U.S. economy, "strengthening" the antidumping laws in this country would not only raise costs for American consumers, but also likely would trigger more antidumping cases against U.S. exporters worldwide, through similar antidumping rules adopted by other governments in future years.

---

[84] In the period 1988-1992, 166 cases were filed against the United States, compared to 98 against Japan, 75 against Korea, 69 against Brazil, and 13 against Canada. A total of 1,196 were filed worldwide. U.S. International Trade Commission, The Year in Trade: Operation of the Trade Agreements Program, Reports 40-44 (1988-1992).

The new GATT Antidumping Agreement[85] was drafted in the spirit of fair and open trade, but individual governments still will determine what they regard as the unfair pricing of imports. The new agreement cannot eliminate the bias in favor of domestic industries in every country, but the new rules are intended to improve the transparency and fairness of national antidumping laws. The GATT agreement requires governments to follow certain rules in determining when dumping cases may legitimately be filed by domestic producers, and specifies some procedures that must be followed in calculating whether goods are being sold "at less than fair value." A primary goal in the Antidumping Agreement is for governments to make their antidumping laws compare real market conditions in a producer's home country and its export markets, and not to bias the process of finding whether dumping has occurred by resorting to unrealistic accounting rules. Countries also are supposed to reexamine antidumping orders at least every five years and revoke those that are no longer valid. This provision of the Uruguay Round agreement has been criticized by some as "weakening" the U.S. trade laws.

When an antidumping case in the United States is decided against an accused importer, the Commerce Department imposes a tariff on the imported product, in effect raising its price to a "non-dumping" level. The amount of the tariff is calculated by using accounting procedures spelled out in the antidumping law. Advocates of "strengthening" the law in Congress and the Administration would amend the technical accounting procedures in ways that would help domestic producers more easily win antidumping cases. But if that happens, other countries will toughen their antidumping rules as well. The result: a general increase in tariffs by means of case-by-case litigation, as industries

---

[85] Office of U.S. Trade Representative, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [cited hereafter as MTN/FA] (Washington, D.C.: U.S. Government Printing Office, 1994), II-A1A-8.

in the United States and around the world file charges against each other alleging "less than fair value" pricing. This would perversely close markets to competition rather than opening them.

Comparing Foreign and Domestic Prices

One of the most serious problems under current U.S. antidumping law is the Commerce Department's method of comparing an importer's prices charged in the United States with prices in its home country. An average home-market price is computed by obtaining sales data. The average price is then compared with individual sales transactions (not the average) in the United States. Any U.S. sales that are above the average home-market value are disregarded.[n6] But if any U.S. sales are found to be below the average home-market value, the Department concludes the imported product has been dumped, and a "dumping margin" is calculated on the basis of the price differences between the two countries.

The Uruguay Round Antidumping Agreement requires that this unfair method be changed to use average transaction prices in both markets (an "apples to apples" comparison).[n7] The proposed legislation, however, specifically creates a loophole to evade this requirement. Parties to an antidumping case may

---

[n6] The comparison of "price" to "value" is not a simple exercise because the calculations are not simple. Note that "value" is based on the producer's cost-accounting data according to statutory rules, and it is thus the second major area where arbitrary, unfair results can be mandated by law or administratively imposed by a government favoring a domestic industry. Cost accounting depends far more on judgmental factors than accounting for financial reports because of different ways a producer's general fixed costs might be allocated to individual products.

[n7] MTN/FA, H-A1A-8, @ 2.4.2, pp. 3-4.

request an annual review of a dumping order and the new GATT requirement for comparing average prices would not apply to an annual review. This deliberate omission would permit the Commerce Department to conclude there has been a significant increase in a product's dumping margin after such a case review, through an "apples to oranges" comparison based on individual below-average transaction prices only.

Dumping When the Importer and Exporter are Related

Increasingly in international trade, companies produce components of products in one country and bring them to a second country for further work or modification before sale. Cost accountants and economists employed by a company use various methods to allocate indirect selling costs, including such things as advertising and promotion costs, and to set the selling price depending on how managers view market conditions.

The new GATT agreement does not require any change in current U.S. law in this area. But the Administration has proposed to change the current practice, which is complicated enough but in general tries to determine the price at the factory gate. The proposal is to determine the price to the first unrelated purchaser in both the U.S. market and the exporter's home market. This change would give the Commerce Department more power to disregard the way international companies allocate their indirect costs.[a8] But there is also a strong lobbying effort by domestic producers who compete in the U.S. market with foreign companies that built factories here in the 1980s on behalf of a different method, which would require the Commerce Department

---

[a8] Ways and Means Draft Legislative Language, op. cit., pp. 96-100.

to treat indirect costs in a specific way that would bias the comparisons in favor of alleged dumping.[n9]

The 1980s saw a significant increase in direct foreign investment in the United States, which created millions of jobs, but both foreign-owned and domestic companies that import component parts from foreign affiliates are vulnerable to the abuse of antidumping laws. Competitors could accuse internationally diversified companies of dumping and win cases that would require the government to impose punitive tariffs. Even the threat of such litigation would jeopardize future foreign investment in the United States and the benefits of competition and lower prices, which would not only affect U.S. consumers but also thousands of U.S. companies that depend on international suppliers to produce their own goods and services for export.

More careful economic study should be done before Congress changes the rules in these cases. It is unclear how the Administration's proposal would work, and any change in the U.S. antidumping law in this area would be a minefield, with consequences that may increase protectionism. The United States economy depends critically on the free movement of investment, both to enable foreign companies to establish factories here and for U.S. companies to diversify abroad. The Administration's proposal would give the Commerce Department sweeping powers to determine the way business must allocate costs. The investment decisions of business worldwide could be affected, after the fact, by arbitrary bureaucratic decisions in antidumping cases. It might no longer be prudent for many companies to invest in the United States.

[n9] The so-called Exporter Sales Price (ESP) methodology as described in the Administration's memorandum: "This is perhaps the most technical and obtuse issue in implementing the AD agreement. Unfortunately it is also one of the most important." Inside U.S Trade, June 17, 1994, p. S3.

Antidumping Duty as a Cost

Another proposed change that would also strongly bias the U.S. antidumping laws against imports, in cases where the foreign exporter and domestic importer are related, involves the accounting treatment of money deposited with the U.S. Treasury. The proposal would effectively double the tariffs in these related-party cases. Under current U.S. law, dumping duties are calculated retrospectively, but importers accused of dumping have to deposit their potential dumping duties with the U.S. Treasury until a review determines the actual amount, if any, of the tariff. Later, when a subsequent review of the dumping charge is made, the deposit is used to pay the duty or refunded.

Under the proposal, during the period the Treasury is holding an importer's deposit, the Commerce Department would calculate the imported product's price in the United States (which determines if "dumping" has occurred) by subtracting the deposited amount from any actual sales prices, treating it as a cost rather than a financial asset. Thus the only way an importer could avoid being found guilty of dumping -- and being stuck for the duty twice -- would be to increase its U.S. price by twice the amount of the duty to avoid any risks, which would mean no price competition at all. The issue is further biased against importers by the Administration's proposal specifically not to follow the new GATT requirement to use average market prices during the review period, as discussed above.

This measure was not contained in the Administration's published draft proposal, but Congress is likely to insist it be in the implementing legislation put before lawmakers because it resembles a practice in the European Union and Canada, which do not use a retrospective system to calculate dumping. Under the system used by other countries, dumping duties are paid in advance and not later modified by a review of the case.

Captive Production

The International Trade Commission (ITC) decided a case last year involving flat steel products, including steel at different stages of manufacturing. At each stage as a product is processed, it can be sold to customers or used by the same firm for further processing. The steel industry petitioners failed to obtain the dumping protection they sought last year because, as the ITC analyzed the facts of the case, the test of harm to the domestic industry was deemed not to have been met. But if steel that was further processed by the same firm had been artificially excluded from the total amount of domestic production, the test might have been met.

A proposed alteration to the Administration's draft legislation by some in Congress is to mandate the methodology the ITC must use in these cases, so that domestic production of intermediate products consumed within the same company to make another product cannot be counted. As a result, the ITC would be stripped of its current discretion to exclude such production, or not, in its analysis if it is appropriate given the facts of each case. The Administration did not include this very parochial proposal sought by lobbyists for the steel industry in its recommendations. It is contrary to the traditional requirements of international law in determining injury, and contrary to the Uruguay Round agreement.[n10] The ITC is not an agency so biased against U.S. domestic producers that its analysis of the facts of each industry's conditions of competition needs to be dictated by Congress.

[n10] MTN/FA, II-A1A-8, @ 4.1, p. 6 and @ 3.4, p. 5.

Compensation for Petitioners

Under current law, antidumping duties are general revenue to the Treasury. Two proposals in Congress[all] would provide for the payment of dumping duties into a special fund that would then be used to compensate companies supporting an antidumping petition for various alleged injuries. Aside from providing a subsidy to domestic industry petitioners, which could be illegal under the GATT rules, payments to any company that supported a petition for dumping relief would amount to a private right of action, and a lucrative source of new income for trade lawyers. In addition, the proposal would provide a powerful incentive to domestic industries to harass importers by bringing petitions, increasing the probability that American consumers would ultimately have to pay higher prices for a wide range of products as a result of higher tariffs.

Conclusion

There is a confusion between the advocacy of antidumping measures to promote trade on equal terms and the actual use of these laws as a smokescreen for protectionism. A prominent critic of antidumping is J. Michael Finger, Lead Economist for Trade Policy at the World Bank. In his recent book, Antidumping, How it Works and Who Gets Hurt, Finger concludes:

Antidumping, as practiced today, is a witches brew of the worst of policy-making: power politics, bad economics, and shameful public administration. Antidumping law is an oxymoron. Expansion of the power of the state to act against imports in the name of antidumping has been built on the meanest of violations against the principles of role of law. Antidumping is a particularly insidious threat in that it appears to bring systemic justification to

---

[all] H.R. 4206 sponsored by Representatives Ralph Regula (R-OH) and Norman Mineta (D-CA), and H.R. 47 16 sponsored by Representative Nancy Johnson (R-CT).

the trade restrictions it creates: it is as if the GAIT system were programmed to destroy itself.[n12]

Since a fast track bill is being put together by congressional leaders and the White House, it may already be too late to have a full and open debate about the way in which the United States should comply with the new GATT Antidumping Agreement in the Uruguay Round implementation legislation. But before they try to "improve" on the GATT agreement by modifying the antidumping laws, lawmakers should carefully investigate the costs and purported benefits of the U.S. antidumping laws. Because amendments are not permitted, the fast track legislative process tends to invite back room negotiations between the Administration and advocates of particular trade law changes that have no general economic benefits, because the White House and congressional leaders want to assure wide support for the bill when it is finally introduced in Congress. Some of the proposals discussed above could have extremely serious economic consequences on the U.S. economy, and the "back room" nature of negotiations have given protectionists a rare opportunity to insist on measures to gain their support.

Supporters of the Uruguay Round of GATT and its objectives of more open world trade should insist that the fast track implementing legislation be narrowly drafted to make only those changes in U.S. law necessary to adopt its specific provisions. The antidumping laws are, after all, U.S. domestic statutes that Congress could debate and amend in the future in a more open manner, without the constraint of the fast track process. That debate is needed. Hopefully, the more the American people learn about how "antidumping" laws are used to raise prices to some U.S. companies for the profit of others, to violate the spirit of GATT rules, and to reduce American

---

[n12] Ann Arbor: University of Michigan Press, 1993, p. 57. Emphasis in the original.

competitiveness, the more likely will be the eventual repeal of the largely protectionist antidumping rules.

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Copyright 1993 The Bureau of National Affairs, Inc.,

BNA INTERNATIONAL TRADE DAILY

Feb. 4, 1993

LENGTH: 999 words

TEXT: Steel LOWER ASSESSMENTS SEEN FOR STEEL FIRMS HELPING IN INVESTIGATION OF DUMPING CASES

WASHINGTON (BNA) -- A Commerce Department official said Feb. 2 that foreign steel companies stand to be assessed with lower duties in antidumping cases if they assist the investigation of their pricing practices.

The International Trade Administration has no intention of changing methodology for determining alleged levels of sales of steel products in the United States below fair market value, said Joseph Spetrini, deputy assistant secretary for import compliance. Commerce Jan. 27 charged 19 countries with dumping steel products in the United States, triggering preliminary duties on steel imports (17 DER A-5, 1/28/92).

Spetrini said the preliminary ruling was outside the realm of policy and was the result of petitions filed by U.S. steel companies last year.

The ITA decision was in no way influenced by other agencies or the White House, he said at a press conference.

The official called on companies cited in the petitions to supply information requested by the investigation. In general, the data show that where companies participate, the dumping margins are lower, he said. When countries cited in petitions do not supply data, or make an insufficient response, ITA uses figures supplied by petitioners, a practice known as best information available.

Britain--which had the dumping margin of 109 percent found against it--declined to participate in the investigation, Spetrini said.

Final ITA dumping determinations for Argentina, Canada, Italy, Japan, Mexico, and Romania are expected by April 12 and for the remaining countries by mid-June. Where countries have asked for extensions, the decision is expected by June 20, Spetrini said.

If the determinations affirm the preliminary findings, the ITC will have 45 days to determine whether the imports materially injure or threaten material injury to the U.S. industry.

EC Industry Reaction

In the European Community, the European steel industry vehemently condemned the U.S. decision to impose provisional duties as "unjust and unacceptable," in a declaration issued Jan. 28.

EUROFER, representing the European steel industry, Jan. 28 criticized the level of antidumping duties imposed as "abnormal," reflecting both the "arbitrary" manner in which the Department of Commerce calculated the duties and the "erratic fluctuations of the dollar for which the steel industry bears absolutely no responsibility."

Ruprecht Vondran, president of the German Steel Federation (Wirtschaftsvereinigung Stahl) said in a printed statement that with the antidumping measures the United States was "openly attempting to close its steel market as tightly as possible to imports from anywhere."

The German Steel Federation is particularly annoyed by the imposition of duties against German steel products because, as Vondran said, in 1992 the German steel companies curbed their deliveries to the United States and in fact had "remained 40

percent below the quota allocated them by the U.S. administration" under the 1982 voluntary restraint agreement with the EC.

Brazilian Industry

Three major Brazilian steel companies were affected by the decision, which placed dumping duties from 8.47 percent to 109 percent on imports of Brazilian steel.

The Usiminas steel company, which was sold by the Brazilian government to private sector buyers in November 1991, criticized the Department of Commerce actions, which it said relied on "continually changing methodology in its investigations."

The statement also charged that the Commerce Department did not permit adequate time to foreign steel companies to refute the allegations.

The executive director of the Brazilian Steel Institute (IBS), Rudolf Buhler, noted that the duties would effectively block all sales of the cited products to the U.S. market. With access to the U.S. market closed off not only to Brazil but the 18 other countries named in the Jan. 27 ruling, competition for remaining world markets will increase, which will depress world steel prices further, Buhler said.

With sales last year of $1.5 billion, Usiminas said it could make up for the $46 million in lost sales to the United States by increasing its domestic sales and by increasing exports to the rapidly growing economies of the Far East and Southeast Asia.

Brazilian steel executives and diplomats are also reportedly studying the possibility of proposing a new voluntary restraint agreement with the United States. While such an agreement would establish quotas for Brazilian steel exports to the United States, it would permit lower priced steel from Brazil and stop the

trade actions being brought by U.S steel companies and labor unions.

Although Brazilian companies have received some of the highest dumping duties of any of the 19 countries named, Brazil does not consider the U.S. actions to be discriminatory. Rather Commerce did not sufficiently take into account the high rate of Brazilian inflation, which led U.S. technicians to calculate erroneously that the home market price of steel was considerably higher than the price sold in the United States, a diplomatic source said.

According to published reports, a number of steel companies said they would discontinue purchases of raw materials from U.S. suppliers to protest the decisions and to put pressure on the U.S. government.

In 1991, Brazil exported 300,000 tons of the affected products (hot and cold flat steel, steel plates, and galvanized steel) to the United States at a value of $115 million. Brazil exports $3.5 billion in steel per year, of which 13 percent, $450 million, is consumed by the United States.